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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

vs.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED JULY 25, 1938

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[Citation in usual form showing service on Frederick H. Wood and John B. Gage omitted in printing.]

2 In United States District Court for the Western Division of the Western District of Missouri

In Equity. No. 2338

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP COMMISSION COMPANY, PETITIONER

vs.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
DEFENDANTS

Petition

Filed July 19, 1933

To the Honorable the Judges of the District Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, Fred O. Morgan, doing business as Fred O. Morgan Sheep Commission Company, brings this petition in equity against the United States of America and the Secretary of Agriculture of the United States (hereinafter called the "Secretary") for the purpose of suspending, enjoining, and annulling a certain purported order of said Secretary dated the 14th day of June, 1933, in a proceeding pending before said Secretary entitled "Secretary of Agriculture vs. L. B. Andrews, et al., Docket No. 311." For cause of action, petitioner alleges and shows:

I

Petitioner has its principal office and place of business in Kansas City, Missouri, in the Western Division of the Western District of Missouri, and is a citizen and resident of the State of Missouri, and a market agency registered with the Secretary of Agriculture of the United States under and pursuant to the provisions of the Packers & Stockyards Act, 1921 (42 Stat. L. 163) engaged in the business of selling or selling and buying livestock for others at the Kansas City Stock Yards located in Kansas City, Missouri, and in Kansas City, Kansas, posted by the Secretary of Agriculture as a public stock yard pursuant to the provisions of said Act.

II

The United States of America and the Secretary of Agriculture are made defendants in this action pursuant to the provisions of said Packers and Stockyards Act, 1921, the Commerce Court Act (36

Stat. L. 539) approved June 18, 1910, and the District Court Jurisdiction Act, being a part of the Urgent Deficiency Appropriations Act (38 Stat. L. 219) approved October 22, 1913, and amendments thereof. The Secretary on the 7th day of April, 1930, issued and caused to be delivered to this petitioner and the other respondents therein named a certain document described as an "Order of Inquiry and Notice of Hearing" entitled "Docket No. 311, Department of Agriculture." This Order and Notice advised this petitioner that an inquiry would be made by the Secretary under the provisions of Title III of the Packers & Stockyards Act, 1921, into the reasonableness and lawfulness of the rates and charges of this petitioner and other respondents therein named (hereinafter referred to as respondents) for stockyard services rendered at the Kansas City Stock Yards, and that a hearing would be held before an Examiner designated by the Secretary in respect thereto in Kansas City, Missouri. A hearing was subsequently held before one John C. Brooke, purporting to act under and by the authority of the Secretary, and was concluded on February 10, 1931. On the 27th day of March, 1931, oral arguments in respect to the evidence presented at the hearing were had before one R. W. Dunlap, purporting to be the "Acting Secretary of Agriculture," at Washington, D. C., and a brief was subsequently filed on behalf of this petitioner. On May 18, 1932, there was issued by the said R. W. Dunlap, purporting to be the then Secretary of Agriculture, a certain document entitled "Bureau of Animal Industry, Docket No. 311, Proceedings, Findings of Fact, Conclusion and Order." This petitioner, on account of the abnormally low prices of livestock then obtaining, on the 11th day of May, 1932, filed with the Secretary a Schedule of Rates and Charges for stockyard services rendered by it at the Kansas City Stock Yards, differing in structure and amounts of charges from the Schedule of Rates and Charges in effect at the time the aforesaid Order of Inquiry was made. Petitioner states that said Schedule of Rates and Charges so filed by the petitioner prior to the making of any of the aforesaid orders in said proceeding was not suspended by the Secretary pursuant to the provisions of the Packers and Stockyards Act, 1921, and is now in force and effect. The Schedule is set forth in Paragraph 84 of the Order. On May 26, 1932, this petitioner filed a Petition for Re-hearing and Re-investigation of the matters in said Notice of Inquiry referred to, which was granted by the Secretary on July 15, 1932. A re-hearing was had at Kansas City, Missouri, commencing on the 6th day of October, 1932, and concluding on the 16th day of November, 1932, before the said John C. Brooke, as Examiner. Thereafter, and on the 24th day of March, 1933, an oral argument upon the evidence presented at said hearing was had before one Rexford G. Tugwell, then purporting to be the Acting Secretary of Agriculture. Subsequently thereto a brief was filed on behalf of this petitioner. Thereafter, and upon the 14th day of June, 1933, there was issued by the Secretary of Agriculture a certain document entitled "Bureau

of Animal Industry, Docket No. 311, Proceedings, Findings of Fact, Conclusion and Order." (hereinafter referred to as the "Order") attached hereto, marked Exhibit "A," and made a part hereof, which said Order is by this action sought to be suspended, enjoined, set aside and annulled. Petitioner states that on the 5th day of July, 1933, there was filed with the Secretary of Agriculture by the petitioner a Petition for Re-investigation and Re-hearing, a copy of which is attached hereto, made a part hereof, and marked Exhibit "B." The Secretary denied said rehearing on July 6, 1933, and extended the effective date of the Order to July 24, 1933.

III

5 The Secretary in said Order finds and concludes that the Schedule of Rates and Charges of this petitioner now in effect contains rates and charges unjust, unreasonable, and discriminatory, and said Order prescribes lower and different rates and charges for the specific stockyard services therein described as set out in Paragraph 180 of the Order. Such Schedule of Rates and Charges so set out in said paragraph is required to be filed in tariff form with the Secretary, and no amounts in excess of the rates and charges therein provided are to be collected thereafter by this petitioner for stockyard services rendered by it on and after the 24th day of July, 1933. Petitioner states that failure to comply with the terms and conditions of said Order will subject this petitioner to heavy and severe fines and penalties as provided in said Packers and Stockyards Act, 1921, and in addition thereto, petitioner as a market agency may be subjected to numerous and vexatious suits for recovery of reparation by shippers of livestock to the market agency conducted by this petitioner at said Kansas City Stock Yards.

IV

Petitioner alleges that petitioner was denied and failed to receive, although duly demanded, a full hearing upon the matters and things set forth in said Order of Inquiry, or any of them, and that it has not been accorded the full hearing to which it is entitled under the provisions of the Packers and Stock Yards Act of 1921 and under the Fifth Amendment to the Constitution of the United States, and that by reason thereof the order of the Secretary of Agriculture made herein on June 14, 1933, is null and void as not being in compliance with said statute and would if enforced deprive petitioner of its liberty and property without due process of law; that petitioner has been deprived of the full hearing to which it is entitled as aforesaid, by reason of the following matters and things, as to each of which petitioner alleges that it constitutes in and of itself and together with any other or others thereof, a denial of the full hearing to which petitioner is entitled by virtue of said statute and the Fifth Amendment to the Constitution of the United States, and

petitioner expressly demands that the defendants make separate and explicit answer to each of the matters and things hereinafter set forth, irrespective of whether or not it be alleged in a separate lettered paragraph:

6 (a) Henry A. Wallace, the Secretary of Agriculture, who made and signed the order of June 14, 1933, herein was not personally present when any of the testimony herein was taken and did not hear any of said testimony given, nor, on information and belief, was such testimony, or any of it, read to or by him, either the testimony offered by the petitioner or by the defendants.

(b) All of the testimony taken in the administrative proceeding herein was heard by John C. Brooke, an examiner of the Department of Agriculture. The petitioner offered the testimony of sixty-six witnesses. The respondents offered the testimony of forty-four witnesses. As to the testimony of each one of these witnesses, the petitioner alleged on information and belief that the Secretary neither heard it nor read it, nor had it read to him, nor read or examined any fair or adequate abstract, analysis, or synopsis thereof.

(c) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(d) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(e) In the course of the administrative hearings before Examiner Brooke, the petitioner introduced one hundred thirty exhibits and the respondents introduced three hundred eighty-six. Petitioner alleges on information and belief as to each of these exhibits that the Secretary did not read it, did not have it read to him, nor did he read any fair or adequate abstract, analysis, or synopsis thereof.

(f) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(g) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(h) At the conclusion of said administrative hearings before said examiner, petitioner demanded that the Secretary personally hear oral argument on its behalf. The Secretary failed and refused to hear oral argument.

(i) On or about the 25th day of May 1933, petitioner submitted a brief on the law and facts involved in said administrative hearings with the demand that the Secretary read and consider the same. Petitioner alleges on information and belief that the Secretary failed and refused to read said brief.

(j) Petitioner further alleges on information and belief that the Secretary did not read any fair or adequate abstract, analysis, or synopsis of said brief.

(k) Petitioner alleges on information and belief that the Secretary did not examine or consider said brief.

(l) Petitioner alleges on information and belief that the Secretary did not judicially appraise the arguments contained in said brief.

(m) At the conclusion of the administrative hearings before said examiner, petitioner demanded that a tentative report upon the evidence be prepared to which it might make exceptions prior to oral argument before the Secretary thereon. Petitioner's demand was refused and no tentative report was ever prepared.

(n) On information and belief, instead of personally considering the evidence and argument presented by petitioners and judicially appraising same, the said Secretary, without warrant or authority of law, delegated to one Rexford G. Tugwell, who purported to act in the premises as and in the place and stead of the Secretary of Agriculture, the powers and authority vested by law solely in the said Secretary, which powers and authority involved the exercise of legislative and judicial discretion and the determination of the issues with respect to the justice, reasonableness, and lawfulness of the rates and charges of this petitioner. Said purported appointment of said Tugwell as Acting Secretary of Agriculture to act in the place and stead of the said Secretary was unauthorized and illegal by reason of the fact that from the time he began to act until June 14, 1933, when the order herein was made, the said Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause, in the performance of the official duties of Secretary of Agriculture.

V

8. The conclusion contained in the Order as expressed in said Schedule of Rates and Charges are arbitrary, erroneous, and do not constitute a statement of just, reasonable, and non-discriminatory rates and charges, as required by said Packers and Stockyards Act, 1921, in that they are predicated upon findings of fact set forth in said Order made without evidence and contrary to all the evidence presented at the hearings, hereinbefore referred to, in the following particulars:

(a) The statement (Paragraph 113) that the respondents in 1931 "in the face of almost universal lower levels in the United States were attempting to maintain their personnel and salaries thereof at levels obtaining in the more prosperous year 1929, and that this necessarily had a depressing effect upon the net moneys available to the owners of the respondent" market agencies, as shown by audits, is contrary to the testimony submitted by accountants for both the Government and the respondents. The amount claimed as an element of total costs representative of compensation to workers was less in the year 1931 than in the year 1929 by \$403,208.88, or approximately 22% of the total compensation to workers in the year 1929. The selling and buying salaries for all respondents recognized by the Chief Accountant for the Government were less by \$231,703.51 in 1931 than

in 1929, or a reduction of approximately 30%. All of the evidence showed that the diminution in net moneys available to owners of the respondent market agencies in 1931, as compared with net moneys available to the owners of market agencies in 1929, was due to a reduction of approximately 13% in gross revenues, and by reason of the further fact that respondents were unable to reduce proportionately operating costs, such as rent, utility services, postage, taxes, and other fixed expenditures. Petitioner states that the gross revenue collected by all respondents as selling and buying charges in the year 1932 was less by 24.54% than in the year 1929, and for the first five months of the year 1933, was less by 18.96% than the revenue collected in the first five months of the year 1932. The reduction in 1933 was due to the combined effect of lower charges and the reduced volume of business handled.

(b) The Order (Paragraphs 142 and 143) holds that it is reasonable to expect a salesman of cattle and calves to sell efficiently 29,000 head of cattle a year, a salesman of hogs to sell efficiently 85,000 head of hogs a year, and a salesman of sheep to sell efficiently 250,000 head of sheep a year. The Order states that each of the salesmen is presumed, in addition to the actual transaction of the sales, to perform all of the services incidental but necessary to the selling operation customarily performed by these salesmen. These services include the maintenance of contacts with the owners of livestock prior to shipment, appraisal in the country, supervision enroute to market either while on pasture, in feed lots, or at railroad feeding stations, keeping informed as to the changing market conditions, sorting and grading the livestock at the market, consulting with owners of livestock at the market, or advising them of the result of the sales if away from the market together with such other duties as are usually performed by competent and efficient salesmen. This finding is in conflict with all of the credible and competent evidence in the record. The evidence shows that no salesman employed by any respondent during any year reached or attained such a standard of performance. The average number of head handled per salesman either in the year 1929 or 1931, or any other year, by this petitioner, or by any other of the 61 respondents mentioned in the proceeding, is shown by the evidence to have been less than the standard set forth by the Order and upon which the costs formulated by the Order are based and predicated.

The actual application of this formula in the year 1931 would have reduced the number of cattle salesmen actually employed in the sale of cattle and calves from 188 to 78.77 men. These salesmen would have been required to sell 2,284,207 head of cattle and calves, making 437,688 separate sales at the rate of 8.9 sales per man in each active selling hour. Each salesman would have realized in net proceeds to owners of cattle and calves \$2161.32 per hour instead of \$635.55 per hour. The formula as to hogs reduces the number of hog salesmen actually engaged in 1931 from 50 men to 12.3 men. These men would be required to sell 1,045,048 hogs and to make 13.48

sales per hour, each realizing an average value of \$121.94. The net proceeds of sales per actual selling hour for each salesman would be increased from \$470.34, the amount actually returned to users of the service, to \$1,913.23. The number of sheep salesmen would be reduced from 15 to 7.59 men. These salesmen would be required to sell 1,896,608 head of sheep in a year, making 9.05 sales per selling hour and actually disposing 400.47 head per selling hour. The net proceeds of sales per salesman returned per hour would be increased from \$1,080.02 to \$2,134.51.

The evidence at the hearing showed that livestock salesmen, unlike ordinary salesmen, determine the price for the commodity they sell. The formulas set and standards determined are not only contrary to all the evidence before the Secretary, but the accomplishment of the results demanded would involve the complete destruction of the efficiency of the marketing operation, cause tremendous losses to the sellers of livestock, and establish an obstruction in the current of commerce in respect to livestock at the Kansas City Stock Yards of such nature as in and of itself to constitute a violation of the provisions of the Packers and Stockyards Act, 1921.

(c) The finding of the Secretary that the sum of \$4,000.00 a year was a reasonable compensation for a cattle salesman, \$3,000.00 a year for a hog salesman, and \$3,500.00 a year for a sheep salesman, regardless of whether such salesman be an owner or an employee, and irrespective of his relative ability, experience, energy, or the time devoted to his work or services incidental thereto, is not based upon any evidence in the record, and is contrary to all of the testimony in the record, which was to the effect that the service value of such salesmen was unlike as a result of individual differences in experience, ability, personality, energy, and other characteristics, and that owner salesmen as a class were men of greater skill, ability, experience, and energy than employed salesmen. The finding is contrary to the testimony of all witnesses who gave evidence with respect to the amount of compensation to which owner-workers connected with this petitioner and other respondents were reasonably entitled for the services rendered by each of them. The Order, in finding that these witnesses were not particularly qualified to express opinions upon this subject, disregards all of the evidence in respect to the qualifications of such witnesses.

(d) The conclusion contained in said Order, to the effect that costs classified as "Business-getting and Maintaining Expenses" were unnecessary and excessive, was without evidence in support thereof and contrary to all of the evidence in the record. The costs so classified included amounts actually expended during the year 1931 by this petitioner and others of the respondents for traveling expenses incident to the appraisal of livestock before sale and supervising the feeding of livestock enroute to market at feeding stations, for advertising, for the preparation, printing, and posting of circulars and market reports sent to stockmen; for automobile maintenance and transportation in connection with the ren-

dition of the stockyard services required of petitioner under the Act, and for dues and assessments paid to the Kansas City Live Stock Exchange, a voluntary Association, to which this petitioner belongs, for the support of the varied and essential activities of said Exchange. The Order erroneously treats all expenses classified by the Government accountants as "Business-getting and Maintaining expenses" as expenditures incident to procuring new business through the entertainment of prospective customers and advertising, whereas more than 80% of the expenses so classified by the accountants were in fact expenses incurred in the actual rendition of the stockyard services this respondent is required to render under the Act. The amount of expenses so classified and recognized by the Secretary and covered into the rates established would be insufficient to pay all traveling expenses actually incurred by this petitioner, would leave nothing for the payment of dues and assessments due to the Kansas City Live Stock Exchange, for the sending out of market circulars and market information to patrons, for any form of advertising, or for the operation of automobiles, or for the entertainment of shippers. The undisputed testimony shows that during the period mentioned in the Order commission rates at Chicago and St. Louis, competitive markets, collected by market agencies at such markets were substantially higher than charges of this petitioner. Despite higher rates during said period, the percentage of livestock originating in the territory tributary to Kansas City marketed at Chicago and St. Louis increased in relative volume. Other undisputed evidence discloses the intensity of the competitive efforts of packers and others to divert livestock from the Kansas City market. The clear necessity is apparent for greater rather than reduced expenditure of time, effort, and money by this petitioner in getting and maintaining business. The effect of the Order, therefore, in eliminating expenditures for business-getting would be to increase rather than decrease unit operating costs of this petitioner.

12

VI

Petitioner states that the conclusions expressed in said Order and upon which the Schedule of Rates and Charges for stockyard services contained therein is based and predicated are arbitrary, inaccurate, and erroneous for the reason that relevant facts appearing from the undisputed evidence taken at the hearings were ignored in the Findings of Fact set forth in the Order in the following particulars:

(a) The evidence showed conclusively that the Schedule of Rates and Charges first placed under inquiry and higher in amount by more than 10% than the rates and charges found to be unjust and unreasonable by the Secretary was established after hearing and investigation by the then Secretary as a just, reasonable, and non-discriminatory Schedule of Rates and Charges under conditions much more favorable to petitioner from the standpoint of both gross and operating net income than the conditions existing in 1929 or subse-

quent thereto or which may be reasonably expected to exist during the period in which the Order may be effective. It was also shown that the rates and charges under inquiry expressed in percentage of net sales proceeds handled were less than 2% thereof and less on a sales percentage basis than the rates and charges in effect at the Kansas City Stock Yards by market agencies during the period of the greatest growth and development of the livestock market at Kansas City. Such rates were also shown to be less than the charges for commission or brokerage service for selling any other agricultural product, although livestock, due to its perishable nature and other characteristics, and variability in quality and price, involves a greater expenditure of time, effort, and professional skill on the part of the selling agencies than any other of such compared agricultural commodities. The evidence showed that the value to the user of the service of increased efficiency in the selling service amounts to many times the total of all marketing costs. During the period of the World War and from 1913 to 1919 these rates were increased by only 10%, whereas increases occurred of approximately 200% in cost of living, farm wages, general hourly wages, livestock prices, packing costs, and meat retailing costs and transportation costs, and in

13 brokerage and commission charges affecting other commodities, both agricultural and industrial. The Order in its Findings of Fact or Conclusions does not refer to or consider any of the above evidence, and is erroneous and prejudicial to petitioner in that it failed to give cognizance to the value of the services rendered in determining the amount of just and reasonable rates and charges.

(b) The Order, in Paragraph 129 thereof, states that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle business at the Kansas City Stock Yards properly, but fails to give consideration or weight to the undisputed testimony taken from the official records on file in the office of the Secretary of Agriculture disclosing that the Secretary since 1921 has registered as market agencies at the Kansas City Stock Yards, as competitors of this respondent, applicants for registration who have previously been expelled from membership in the Kansas City Live Stock Exchange for confessed misapplication and embezzlement of the proceeds of the sale of live stock, and has compelled, through court proceedings, the said Exchange and this respondent to extend to such registrants and to many other registrants all of the market facilities of said Exchange, including the use of the Clearing House, participation in the blanket fire insurance policy maintained by the Exchange, the hog dockage and inspection service, and other services operated by the Exchange.

(c) The Order failed also to give weight or consideration to the undisputed evidence showing that under rules and regulations of the Kansas City Live Stock Exchange this respondent and other respondents adopted all reasonable means of promoting economies of opera-

tion and reducing expenditures incident to the getting and maintenance of business. The extent, amount, and nature of these restrictions upon the solicitation of business were shown by the evidence to have been previously recognized by the Secretary through participation in a Market Practice Agreement relating to the transaction of business by market agencies not affiliated with said Exchange, including agencies organized on the co-operative plan.

(d) The Order predicates the conclusions therein reached upon a finding of fact that the demand for livestock at Kansas City, particularly for hogs, is greater than the supply of livestock at the public market. It sets forth the increasingly large number of hogs received by packers direct at their plants through private stockyard operations during the period from 1921 to August 1932, but fails to mention or give weight to other important and relevant evidence in the record. This evidence shows that such purchases of livestock as were made at private stockyards by such packers were consummated with the aid of and upon the basis of market prices determined on the date of purchase as to hogs at the Kansas City Stock Yards by and through the efforts of this and others of the respondents, and that the continuance of such private stockyard operation by said packers was dependent upon the existence of a public price-determining livestock market: This enabled these packers to acquire livestock without contributing proportionately to the cost of the maintenance of said public market. It was further shown that these packers pursued unfair competitive methods and practices in connection with acquiring receipts of livestock through said operations; and that the effect of this situation was not only to reduce the gross revenue of this respondent due to the diminution in volume of hogs and other livestock sold and bought but also to increase the variability from day to day in amount of livestock marketed.

(e) Although the Order contains a finding of fact stating that livestock tends to move from producer to consumers by the most economical route, it fails to mention or refer to the other relevant and undisputed testimony in the record showing that in the early part of the year 1932 the railroads centering at Kansas City established freight rate differentials and market privileges favoring the use of railroad stockyards in the vicinity of Kansas City, Missouri, amounting to many times the total marketing costs on livestock handled at the Kansas City Stock Yards, and that such freight rate differentials have diverted livestock from the Kansas City Stock Yards, and will in the future tend to limit and reduce the volume of livestock sold or handled by this petitioner unless such differentials are abrogated by action of the Interstate Commerce Commission now being sought through a proceeding brought by the Kansas City Live Stock Exchange.

(f) The Order failed to give weight or consideration to the undisputed evidence disclosing operating conditions at Kansas City creating higher market agency or operating costs than others of the five leading competitive markets referred to in said

Order and which were shown to have higher rates and charges in force and effect than those under inquiry or described as reasonable by said Order. The evidence showed a greater variability in the volume of receipts from day to day of livestock at Kansas City, greater diversity in grades of livestock received, delivery of trucked-in livestock to market agencies at unloading chutes instead of at pens assigned to agencies as at other markets, a greater area from which receipts are drawn, a larger proportion of stocker and feeder cattle handled, necessitating double contracts with sellers in the West and Southwestern portions of the country and buyers in the Central and Eastern portions of the United States, all of which increased the expenditure of effort and money necessary in connection with the efficient operation of the business of this petitioner and other respondents as compared with conditions existing upon other markets. The evidence showed that peak receipts by month or week in Kansas City were equal in volume as to cattle and calves to the peak receipts by month or week in Chicago, although the average volume at Kansas City was only 50% of the average volume for the year in Chicago. The Order ignored the effect of variability of volume in creating stand-by expenses and increasing unit operating costs.

VII

Petitioner states that the Order is based on erroneous conceptions of established rules of law and, therefore, the rates and charges provided therein are unlawful and void for the following reasons:

(a) The "functional unit costs" allegedly reasonable set forth in said Order in no instance have a counterpart in the actual experience of any one of the sixty-one respondents named in said proceeding. These theoretical unit costs fixed by the Order when applied to the 1931 volume of all respondents, including this petitioner, save the two co-operatively-organized market agencies, produce an aggregate supposititious handling cost; including return on investment, which is \$607,321.32 less than the aggregate costs found to exist in the actual operation of the business by the petitioner's accountant, and 16 \$422,071.95 less than the aggregate costs and expenses recognized by the Government's Chief Accountant to have been encountered by these agencies in the actual rendition of stockyard services. The costs and expenses recognized by the Government's accountant (R. Exhibit 115) include no expense incident to bad debts, refused purchases, interest paid, errors in accounting, donations to Community Chests, or reserve to meet uninsurable hazards, and no allowance for profits. After these eliminations, the costs recognized by Government accountants are as to all the respondents in the proceeding, including the two co-operatively-organized agencies, \$459,200.73 in excess of the total cost fixed as reasonable by the Order. The complete lack of comparability between the unit functional costs and the total costs expressed in the Order and shown in evidence as applied to the fifty-nine respondents except the two co-operatives, is

demonstrated and shown on the statement herewith filed, made a part hereof, and marked Exhibit "C."

The separation of so-called species costs into functional costs, as for selling, yarding, office work, administration, business-getting, etc., was wholly arbitrary and not based on any natural segregations incident to the actual performance of these functions inasmuch as the same personnel and the same facilities were used very largely to perform all of these functions by petitioner and other respondents. These arbitrary bases of apportionment varied widely from the facts and were based wholly upon the judgment of the person who accomplished the segregation. The testimony of all accountants was to the effect that while aggregate operating costs could be stated with a fair degree of accuracy, functional costs were erroneous to the extent that the arbitrary and hypothetical bases of apportionment or segregation were unsound. The cost finding process in the Order then proceeds to eliminate from these disintegrated or functional costs the portions thereof represented by salesmen's and buyers' compensation and business-getting and maintaining costs, and to substitute therefor arbitrary amounts representing but a small fraction of amounts eliminated. These disintegrated functional costs are then reintegrated on purely an arbitrary or judgment basis. The process employed served to bring about a magnification of errors inherent in the original functional cost separation. The re-

17 integration process ignored the practical situation confronting this petitioner and other market agencies in that such agencies are compelled to operate as independent units handling all species in all kinds and sizes of consignments. The selling costs are found to be unusually low in the case of agencies that have relatively high unit costs in respect to those expenses classified as business-getting and maintaining expenses. These functional costs were considered separately in the rate-making process used in the Order and, therefore, the connection between low selling costs and relatively high business-getting costs in some agencies was lost sight of and received no consideration in the formulation of total costs. Under this procedure, hypothesis rests upon hypothesis and conjecture is piled upon conjecture, to the end that the final result reached bears no resemblance whatever to the facts of the situation as shown by the evidence to exist. Neither the agencies handling average volume, nor any other agency, or class of agencies, including this petitioner, find their functional costs as set out within the range of the total unit cost denominated as reasonable by the Order. The result is an Order, as hereinafter stated, confiscatory of the property and livelihood of this petitioner, and evidences an erroneous conception and application of established rules of law and a complete disregard of all the cardinal principles of sound accounting and cost finding.

(b) The Order purports to allow, in Paragraphs 159 to 163, inclusive, reasonable costs per head to cover compensation for management. Said costs as allowed are, in fact, unjust, unreasonable, non-compensatory, and non-reimbursible of expenses in good faith in-

18 curred by petitioner in that the bases stated for the calculation therefor in Paragraph 159 is the ascertained cost of management of the two co-operative respondent market agencies. Under all the evidence, the costs sustained by such agencies are not comparable with the necessary costs incident to the management of this petitioner's business by reason of the fact that the amount so stated applies to conditions and expenses of management dissimilar and noncomparable with those confronting this petitioner and all others of the respondents except said two co-operatively-organized concerns. This evidence shows that such co-operative associations are managed by their several Boards of Directors, no allowance for whose time and expenditures is included in the amount set out as basic in said Order, and receive in addition assistance from public employees in connection with matters affecting management, including employees of the Department of Agriculture, both in and out of Washington, D. C., the expense of which is not included in the amount stated or estimated by said Order. The statement contained in Paragraph 159 of said Order, to the effect that reasonable rates "should provide also a per head profit, that is, compensation for management and the carrying of uninsurable risks," is based upon an erroneous conception of law in that fair compensation for management and expenses incident to carrying uninsurable risks does not constitute profit, but constitutes, and is, expense. The Order in purporting to allow in the ascertainment of per head costs, for reasonable profits or margin of profits in respect to selling or buying each species of livestock, yet failing so to do, is inconsistent and erroneous.

(c) The Order erroneously failed to allow as an element and part of the capital of this petitioner and upon which a return is allowed by said Order any amount representative of going concern value as shown to exist by the evidence taken at the hearing. The Order holds that a rate of return of 6% on fixed capital and 7% on working capital used by petitioner was reasonable and allows that amount only in calculating the gross return recognized by the Order and covered into the rates and charges established. The total return on invested capital for fifty-nine of the respondents, except co-operatives, amounts to \$49,164.88, whereas this petitioner and other respondents, in accordance with their respective use and employment of capital, were lawfully entitled to a return thereon of not less than \$59,719.21. The Order is in conflict with the uncontradicted testimony of many witnesses, including experienced bankers and others familiar with financing market agency operation, to the effect that interest rates in excess of 8% per annum were reasonable and necessary in order to induce the investment of capital in the maintenance of the business of market agencies under the conditions existing in 1931 at the Kansas City Stock Yards.

19 (d) The Order erroneously fails to allow, as an element of the reasonable cost of operations of this petitioner and other respondents, expenses incident to obtaining insurance against

normal risks and hazards encountered in the business, including insurance partially indemnifying the respondents against loss by reason of the liability imposed on respondents on account of the guaranty of title undertaken by respondents upon the sale and disposition of livestock. As to the fifty-nine respondents, except co-operatives, engaged in selling operations, the Order fails to recognize costs in this category aggregating \$19,918.63 found to exist by the Government accountants and \$11,245.60 found to exist by respondents' accountant.

(e) The Order, in disallowing as elements of reasonable cost and failing to cover into the rates and charges prescribed traveling expenses, dues and assessments necessary to the support of the Kansas City Live Stock Exchange, advertising expense, losses inevitably incident to errors in accounting processes, losses incident to insurable and uninsurable hazards, moneys expended for donations to the Community Chests maintained by the Chambers of Commerce in Kansas City, Missouri, and Kansas City, Kansas, losses incident to bank failures affecting the collection of items or remission of proceeds, amounts actually expended in the employment of salesmen necessary to efficiently handle and transact the stockyard services rendered, invades the right and authority of this petitioner to manage and conduct its own business, inasmuch as all of such expenditures were actually made in good faith in the sound exercise of the best business judgment of petitioner developed as a result of practical experience of many years in the operation of a market agency at the Kansas City Stock Yards.

(f) The effect of the Schedule of Rates and Charges is to permit increases in rates to "dealers" registered under the Packers and Stockyards Act, 1921, and to permit increases in the rates and charges for buying livestock. Such rates are shown by all the evidence in the record to apply to stockyard services, the relative cost of which as compared with selling service does not justify such increases and the increases allowed are not collectible or realizable by this petitioner in the actual and practical conduct of its business. The effect of said

Order is to increase buying rates to an extent approximately
20 40% in excess of the rates and charges for similar buying services of market agencies at Chicago, and establish as reasonable rates approximately 40% less than the rates for selling services at Chicago. An increase is permitted of approximately 40% in the present rates and charges for selling services rendered for "dealers." The rates so stated representing increases are merely "paper" rates and are not predicated on any fair consideration of the record or upon any cost accounting developed by the Order or evidence. An application of such rates to business handled by petitioner under existing circumstances would be impossible without petitioner encountering greater loss than gain. In the calculations contained in this petition as to the yield of the rates prescribed, these increases are not included. In such respects the said Order represents an unwarranted, injudicious and prejudicial attempt, without

evidence, to readjust rates. The buying and dealers' rates so established are discriminatory and prejudicial, and if put in effect would create an obstruction to the flow of livestock in commerce at said stock yards in violation of the Packers and Stockyards Act, 1921.

VIII

The Schedule of Rates and Charges prescribed by the Order is confiscatory as to this petitioner and takes the property of petitioner without due process of law in violation of the Fifth Amendment of the Constitution of the United States in that:

(a) The gross revenue which would have been received by petitioner in the year 1931 if said Schedule of Rates and Charges had been in force and effect would have amounted to \$4,623.96 less than the total calculable costs incurred by petitioner in the rendition of stockyard services (R. Exhibit 207), and in that amount and to that extent the enforcement of the Order would wrongfully and unlawfully confiscate the property of this petitioner.

The confiscatory effect of the Schedule of Rates and Charges prescribed if presently applied to the business of petitioner would be further enhanced by reason of reduction in the gross revenue of petitioner due to diminution in volume of business handled. The gross yield to petitioner of the rates and charges collected was less in 1932 by 70% than the revenues received in 1931, and for 21 the first five months of 1933 less by 5% than during the first five months of 1932. As applied to business of petitioner the said Schedule of Rates and Charges would cause a further reduction in revenue in respect to cattle and calves of not less than —%, in respect to hogs of not less than —%, and in respect to sheep of not less than 13.59%.

(b) The gross yield of the rates and charges prescribed if applied in 1931 would have been less in amount than the total costs of operation of petitioner's business recognized by the Government's Chief Accountant in the Cost Study introduced in evidence (R. Exhibit 115).

The confiscatory character of the Order is further disclosed by the fact that as to twenty out of the sixty-one respondents on the basis of the Government's own costs shown in evidence, which are referred to without prejudice, an operating deficit would be incurred, exclusive of any compensation whatsoever to owners for personal services rendered and any return on capital invested. As to hogs, thirty-nine of the respondents would sustain an operating deficit on the same basis, exclusive of any compensation to owners and return on capital. After allowing the inadequate return on capital provided by the Order, twenty-four of the respondents would sustain a net operating deficit on the basis of the Government's own showing and exclusive of any compensation to owners for personal services rendered. The amount remaining to provide compensation for the per-

sonal services of the 136 owners of respondents would provide an average annual total compensation per man of \$174.50, or 48¢ per day. On the same basis the total compensation for the personal services rendered by the owners of petitioner would amount to \$542.92, whereas the reasonable value thereof as shown by the evidence was \$1,000.00, for one owner.

(c) The rates and charges ordered into effect are individually and severally confiscatory as applied separately to calves, yearling cattle, cattle, hogs, and sheep, and each and all of said rates will fail to yield to this petitioner a fair and compensatory return for the stockyard services rendered by petitioner or a return commensurate with the value of the service rendered, and will not be reimbursable to the petitioner of the actual operating expenses necessarily incurred in the rendition of such services.

22 (d) The Order bases the rates and charges formulated upon the stated assumption that the respondents doing the largest relative volume of business operated their businesses more economically and efficiently than others of the respondents doing a lesser volume of business. On page 39, said Order refers to eleven agencies as having handled more than 50% of the total market volume of livestock at the Kansas City Stock Yards in 1931. The Schedule of Rates and Charges found reasonable by said Order on the basis of costs found to exist by the Government accountants and exclusive of any compensation whatsoever for the personal services rendered by the owners of said respondents, would have lacked \$20,670.28 of meeting the inadequate allowance for return on capital investment provided for in the Order. The Order (page 23) mentions the fact that twenty-three agencies, inclusive of the eleven above referred to, handled more than 75% of the market volume as measured by equivalent carlots. The owners of these twenty-three respondents would have received under said rates on the Government's own showing (Exhibit 115) no compensation whatsoever for personal services rendered and a return on capital invested amounting to only 60% of the inadequate return allowed by the Order.

(e) The net operating loss sustained upon the basis of the Government's own cost showing by the two co-operatively-organized agencies would have been respectively \$22,782.76 and \$14,346.02.

IX

The Secretary erroneously and improperly overruled and denied the Petition for Re-investigation and Re-hearing (Exhibit B) filed herewith and made a part hereof. Petitioner states that in and by said Petition for Re-investigation and Re-hearing the Secretary was advised that economic changes affecting petitioner of radical and far-reaching character and effect had occurred since the taking of evidence at the hearings hereinbefore referred to and prior to June 14, 1933, the date of said Order, rendering the evidence so taken incomplete, inadequate and misleading as an expression of present or future con-

ditions as to revenues, costs or volume handled by this petitioner. Petitioner reasserts as grounds for the relief sought in the petition all of the allegations contained in said Petition for Re-investigation and Re-hearing, to the same effect as if fully set out in this petition.

Your petitioner states that the failure on the part of the petitioner to comply with such purported Order of the Secretary may subject petitioner to prosecution and liability for penalties in large amounts as against which liability your petitioner will have no adequate protection at law and may subject it to multifarious and vexatious suits for reparation on the part of various shippers of livestock. Should your petitioner attempt to avoid liability for penalties under duress and publish and establish the rates specified in the Order of said Secretary, petitioner will be required by law to collect such rates, which in many instances will result in reductions in the revenues of your petitioner, and if later on it should be determined that said Order of the Secretary is null and void, your petitioner would be without means of collecting the difference between said rates prescribed by said Secretary and the present rates without multifarious suits and actions at law, impractical in character, against those shippers to whom such reductions apply. Your petitioner will, therefore, unless the said purported Order is suspended, enjoined, set aside and annulled, and if pending final determination whether or not its enforcement is not temporarily stayed and suspended, suffer irreparable injury, for which it would be without adequate remedy or protection at law.

Wherefore, petitioner prays:

(1) That a writ of subpoena issue immediately out of and under the seal of this Court, and be directed to said defendants, the United States of America and the Secretary of Agriculture, requiring said defendants, on a day certain therein to be specified, to be and appear before this Court and to answer this bill, but not under oath, answer under oath being hereby expressly waived;

(2) That this Court direct that due and proper notice of this petition and proceeding issue and be served forthwith, as prescribed in said Act of October 22, 1913 (28 U. S. C. A., Secs. 41 (28) and 43 to 48, inclusive);

(3) That a court constituted as required by said Act of October 22, 1913 (28 U. S. C. A., Sec. 47) be convened and that said court so constituted and convened shall hear this petition upon due and legal notice to defendants;

(4) That upon the filing of this bill, the Judge of this Court shall call to his assistance two other Judges, one of whom shall be a Circuit Judge, and that upon three days' notice to defendants, this Court shall enter its order staying and suspending the enforcement, operation, or execution of said Order of said Secretary, and each and every part thereof, for sixty days from the date of said Order; and that after five days' notice of the time and place of hearing having been given to defendants, petitioner herein be granted a tem-

porary injunction restraining the Secretary of Agriculture and the United States from enforcement of said Order of June 14, 1933;

(5) That this Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling said Order of said Secretary;

(6) That petitioner have and recover of the defendants the proper costs of this suit; and

(7) That the petitioner have such other and further general relief in the premises as may to the Court be deemed just and equitable.

JOHN B. GAGE,
Solicitor for Petitioner.

[*Duly sworn to by John B. Gage; jurat omitted in printing.*]

Exhibit A to petition

United States of America

Before the Secretary of Agriculture

PRECEDINGS, FINDINGS OF FACT, CONCLUSION, AND ORDER

Bureau of Animal Industry Docket No. 311

SECRETARY OF AGRICULTURE

vs.

25 L. B. ANDREWS, Doing Business as L. B. Andrews Livestock Commission Company; A. B. Bachman, Doing Business as A. B. Bachman Livestock Commission Company; W. N. Baucus and Ira Kimmons, a Partnership Doing Business as Baucus & Company; Charles N. Bird; Charles E. Blount, Doing Business as Charles E. Blount & Company; Frank Boddington, Doing Business as Frank Boddington Livestock Commission Company; Bowles Livestock Commission Company; Burlington Livestock Commission Company; Henry F. Carnes, Doing Business as Henry F. Carnes Livestock Commission Company; Cassidy Southwestern Commission Company; John Clay, F. H. Connor, C. A. Klemen, and J. G. Forrest, a Partnership Doing Business as John Clay & Company; Crider Brothers Commission Company; Warren Cummings, Doing Business as Warren Cummings Livestock Commission Company; W. E. Curtis Doing Business as W. E. Curtis & Company; Charles Dixon Commission Company; E. R. Corrigan and Karl N. Soeder, a Partnership Doing Business as Corrigan & Soeder; Drumm Standish Commission Company; Ehrke-Martin Livestock Commission Company; E. W. Elliott and R. K. Swain, a Partnership Doing Business as Elliott, Swain & Company; Farmers Union Livestock Commission; Farrar, Davis & Campbell Livestock Commission Company; Link Fasken, Doing Business as Link Fasken Commission Company; Gillespie & Jones Livestock Com-

mission Company; W. G. Gladish, Doing Business as Gladish Livestock Commission Company; E. W. Goodson, G. E. Goodson, and O. C. Green, a Partnership Doing Business as Goodson-Green Company; Norman B. Greer, Doing Business as Greer & Company; O. C. Haggart, John H. Wilson, and Glenn Haggart, a Partnership Doing Business as Haggart, Wilson Livestock Commission Company; W. F. Humphrey, Doing Business as W. F. Humphrey & Company; Inman-Hutton Livestock Commission Company; W. E. Burrus, Doing Business as Interstate Livestock Commission Company; J. G. Jackson; Jefferson-Lowry-Davis Commission Company; W. M. Liggett and Roy K. Sanson, a Partnership Doing Business as Kansas City Livestock Commission Company; Harry Kennaley, Doing Business as Harry Kennaley Commission Company; W. C. Kile, Doing Business as W. C. Kile Livestock Commission Company; H. H. Klecker, Doing Business as Hinie Klecker Sheep Commission Company; E. L. Knight
26 and E. Tice, a Partnership Doing Business as Knight & Tice Sheep Commission Company; Harmon C. Knighton, Doing Business as Ham Knighton Commission Company; S. Kraus; J. M. Laird, G. T. Laird, and H. E. Laird, a Partnership Doing Business as Laird Bros. Livestock Commission Company; Walter G. Land, Doing Business as Walter G. Land Livestock Commission Company; W. M. Leitch-Sheep Commission Company; L. Levy; R. H. Lewis, and S. H. Flournoy, a Partnership, Doing Business as Lewis-Flournoy Livestock Commission Company; A. E. Long and Robert B. Perry, a Partnership Doing Business as Long-Perry Livestock Commission Company; Martin Bros. & Lee Livestock Commission Company; A. J. Maurer; Grover C. Maxwell, Doing Business as Grover C. Maxwell Commission Company; H. B. Dorsett, Doing Business as M. K. & T. Commission Company; T. S. Moffett, H. M. Baker, and J. M. McLain, a Partnership Doing Business as Moffett Livestock Commission Company; Fred O. Morgan, Doing Business as Fred O. Morgan Commission Company; Jay D. McCormack, Doing Business as Jay D. McCormack Livestock Commission Company; McDonald Livestock Commission Company; Roy W. Nance, Doing Business as Roy W. Nance Livestock Commission Company; National Livestock Commission Company of Kansas City; John M. Nichols, Doing Business as John M. Nichols Livestock Commission Company; E. E. Sutton, Doing Business as O. K. Cattle Company; W. O. Park; W. H. Peed, Doing Business as W. H. Peed Livestock Commission Company; K. L. Peterson and W. F. Humphrey, a Partnership Doing Business as K. L. Peterson & Company; Bryant Poole, D. L. Dempsey, and James Rutherford, a Partnership Doing Business as Poole-Dempsey-Rutherford Livestock Commission Company; Producers Commission Association; J. M. Ragland, W. B. Storts, and W. L. Burrus, a Partnership Doing Business as Ragland, Storts & Burrus; M. W. Rice and George E. Kirk, a Partnership Doing Business as Rice & Kirk; George P. Robinson and Joe R. Hoover, a

Partnership Doing Business as Robinson-Hoover Commission Company; F. W. Banks and C. A. Rountree, a Partnership Doing Business as Rountree-Banks; Ryan-Robinson Commission Company; Fern O. Sanders, Doing Business as Fern O. Sanders

27 Livestock Commission Company; William M. Schwartz, Joseph M. Nolan, and Laurence Feaman, Jr., a Partnership Doing Business as Schwartz-Feaman-Nolan Company; E. F. Searls, Doing Business as George W. Searls & Son; The Stagner, Pieronnet & Willis Livestock Commission Company; B. C. Stanley, Doing Business as Stanley Commission Company; C. A. Stuart, Doing Business as C. A. Stuart & Company; Swift & Henry Livestock Commission Company; George S. Tamblyn, Doing Business as Tamblyn Commission Company; L. Knop, Henry F. Thies, E. J. Thies, F. W. Thies, and A. C. Thies, a Partnership Doing Business as H. Thies & Sons; Ben L. Welch, Doing Business as Welch Livestock Commission Company; Dan Wester, R. W. Wester, and Joseph Smith, a Partnership Doing Business as Wester Bros. & Smith Commission Company; J. Less White, Doing Business as Less White Livestock Commission Company; Wilson, Egan & Company; Witherspoon Livestock Commission Company; Curtis A. Wood; W. E. Woodford, Doing Business as W. E. Woodford Livestock Commission Company; Ralph W. Wright; Ralph W. Wright and Wm. N. Baucus, Partners, Doing Business as Wright and Baucus Livestock Commission Company; John Clay, F. H. Connor, Alan F. Wilson and Chas. G. Smith, Partners, Doing Business as John Clay and Company; L. E. Tice, Doing Business as Knight & Tice Sheep Commission Company; J. M. Laird and G. T. Laird, Partners, Doing Business as Laird Bros. Livestock Commission Company; Walter G. Land and John E. Maze, Partners, Doing Business as Walter G. Land Livestock Commission Company; Charles F. Viereggs and Robert H. Stover, Partners, Doing Business as W. M. Leitch Sheep Commission Company; H. E. Long, Robert B. Perry and B. W. Perry Partners, Doing Business as Long-Perry Livestock Commission Company; Martin, Blomquist & Lee Commission Company, a Corporation; Grover C. Maxwell and Ben J. Furnish, Partners, Doing Business as Maxwell & Furnish Livestock Commission Company; H. M. Baker; W. C. Bradshaw, Barney Metz and Louize McGrew Moffett, a Partnership, Doing Business as the Moffett Livestock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, Partners, Doing Business as the Ragland, Storts and Burrus Livestock Commission

28 Company; Laurence Feaman and J. M. Nolan, Partners, Doing Business as Feaman and Nolan; Stuart-Robinson-Hoover Company, a Corporation; J. Less White and O. C. Seamans, a Partnership, Doing Business as the Less White & Seamans Livestock Commission Company; R. W. Wester and Joseph P. Smith, Partners, Doing Business as Wester Bros. & Smith Commission Company; Clay W. Stephenson and T. Ray Graybill, Partners,

Doing Business as Graybill and Stephenson; Great Western Order Buying Company, a Corporation; Dave Hamer, Doing Business as Dave Hamer Livestock Commission Company; and Harry Conley, W. H. Cripe and J. Ed Freed, Respondents.

Proceedings

1. This is a proceeding under Title III of the Packers and Stockyards Act, 1921, instituted by the Secretary of Agriculture according to his order of April 7, 1930. By this order of inquiry and notice of hearing the Secretary of Agriculture directed that an inquiry be made into the reasonableness and lawfulness of all rates and charges provided in the tariffs of the respondent market agencies at the Kansas City Stockyard, Kansas City, Missouri.

2. Said order of inquiry and notice alleged that the respondents were registered and doing business under the Packers and Stockyards Act, 1921, as market agencies engaged in the business of buying and/or selling livestock on a commission basis at the Kansas City Stockyard in Kansas City, Missouri, which has been found by the Secretary of Agriculture to be a "stockyard" as that term is defined in Title III of the Act and posted as such; that in accordance with the requirements of said Act respondents had theretofore filed, published, and put into effect a schedule of rates and charges for their services as market agencies as set forth in their tariffs and supplements thereto; that the interest of shippers, producers of livestock who patronize respondent agencies and the public generally require that inquiry be instituted under Title III of the Act for the purpose of determining the reasonableness and lawfulness of the rates and charges of all respondents named therein as set forth in their tariffs and supplements thereto.

29 3. Notice of such hearing was given to the respondents by serving upon them a copy of said order and notice. Pursuant to this order and notice a hearing was held at Kansas City, Missouri; before an examiner designated by the Secretary of Agriculture and said hearing began on December 3, 1930, and concluded on February 10, 1931. The respondents who were members of the Kansas City Livestock Exchange were present by counsel throughout the hearing. The following respondents were not present by counsel: The Farmers Union Livestock Commission and the Producers Commission Association, whose respective managers entered their appearance at the hearing; E. W. Goodson, G. E. Goodson, and O. C. Green, a partnership doing business as Goodson-Green Company who were succeeded by O. C. Green and Robert Coble, a partnership doing business as Goodson-Green Company; J. G. Jackson; W. O. Park; E. F. Searls doing business as Geo. W. Searls and Son; and, Curtis A. Wood. The following respondents had ceased to do business on the Kansas City market at the time the hearing commenced: A. B. Bachman, doing business as A. B. Bachman Livestock Commission Company;

Charles N. Bird; S. Kraus; L. Levy; H. B. Dorsett/doing business as M. K. and T. Commission Company; Roy W. Nance, doing business as Roy W. Nance Livestock Commission Company; E. E. Sutton, doing business as O. K. Cattle Company; F. W. Banks and C. A. Rountree, a partnership doing business as Rountree-Banks; and W. E. Woodford, doing business as W. E. Woodford Livestock Commission Company. Certain changes in the organization of the respondents had taken place as follows: Charles E. Blount, doing business as Charles E. Blount and Company, was succeeded by Charles E. Blount and Earnest E. Skaggs, doing business as Blount-Skaggs Company; John Clay, F. H. Conner, C. A. Klemen, and J. G. Forrest, a partnership doing business as John Clay and Company, succeeded by John Clay, F. H. Conner, A. F. Wilson, and C. G. Smith, a partnership doing business as John Clay and Company; W. M. Liggett and Roy K. Sanson, a partnership doing business as Kansas City Livestock Commission Company, succeeded by W. M. Liggett, doing business as the Kansas City Livestock Commission Company; E. L. Knight and Lawrence E. Tice, a partnership doing business as Knight and Tice Sheep Commission Company, succeeded by
 30 Lawrence E. Tice, doing business as Knight and Tice Sheep Commission Company; J. M. Laird, G. T. Laird, and H. E. Laird, a partnership doing business as Laird Brothers Livestock Commission Company, succeeded by J. M. Laird, and G. T. Laird, a partnership doing business as Laird Brothers Livestock Commission Company; W. M. Leitch Sheep Commission Company, succeeded by Charles F. Vieregg and Robert H. Stover, a partnership doing business as the W. M. Leitch Sheep Commission Company; A. E. Long, and Robert B. Perry, a partnership doing business as Long-Perry Livestock Commission Company, succeeded by A. E. Long, Robert B. Perry, and B. A. Perry, a partnership doing business as Long-Perry Livestock Commission Company; K. L. Peterson and W. F. Humphrey, a partnership doing business as K. L. Peterson and Company, succeeded by K. L. Peterson, doing business as K. L. Peterson and Company. Counsel for respondent market agencies who are members of the Kansas City Livestock Exchange entered appearances for these firms whose organization had been changed.

4. Oral argument was had before the Acting Secretary of Agriculture on March 27, 1931, and respondents' counsel submitted a brief on behalf of the members of the Exchange.

5. On May 18, 1932, the Acting Secretary of Agriculture issued an order directing that on and after thirty (30) days from the date of the order the respondent market agencies and each of them cease and desist from demanding or collecting for any stockyard service the rate or charge shown therefor in the schedule of rates and charges then on file with the Secretary of Agriculture; that on and after said thirty days neither the respondent market agencies nor any of them should publish, demand or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge deemed in

said order to be just, reasonable and non-discriminatory for the furnishing of such service; that at least ten days prior to the date on which said order would become effective each and every of the respondent market agencies publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921; and the regulations of the Secretary of Agriculture thereunder, a schedule showing all rates and charges for the stockyard services furnished by such respondent at the Kansas

31 City Stockyard, Kansas City, Missouri, and all rules and regulations changing, affecting or determining such rates or charges, and that no rate or charge so shown for any such stockyard services be in excess of the rate or charge determined by said order to be just, reasonable and non-discriminatory for such service. The effective date of the order was thereafter extended to July 18, 1932.

6. On May 26, 1932, many of the respondents filed petitions alleging in detail the general economic changes which had developed in the United States since the year 1929, that being the year of the specific financial experience of respondents which the Secretary had used in the determination of the reasonableness of respondents' rates, and further alleging in detail the particular effect upon the business of such market agency of said general changes, especially with respect to the volume of business handled by each of such market agencies. Each of the petitions prayed that the order of the Acting Secretary of Agriculture, dated May 18, 1932, be withdrawn and that this proceeding be reopened for reinvestigation of the matters and things referred to in the order of inquiry and be set down for further hearing upon the subjects set forth in the aforesaid petitions.

7. On May 11, 1932, and prior to the issuance of the order of May 18, 1932, and the filing of said petitions, each and every of the petitioning market agencies filed with the Secretary, to become effective May 23, 1932, a schedule showing either expressly or by reference all rates and charges for the stockyard services furnished by such market agencies at the Kansas City Stockyard, Kansas City, Missouri, each of which schedules has for convenience been designated "Kansas City Livestock Exchange Tariff No. 3," and has been in force and effect since said 23rd day of May, 1932.

8. In view of the decision of the Supreme Court of the United States in the case of Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U. S. 248, and of the District Court of the United States for the Western District of Missouri in the case of St. Joseph Stockyards Company v. the United States 58 Fed. (2d) 290, the Secretary was of the opinion that it was his duty under the law to reopen this

32 docket and hold a rehearing to the end that all parties in interest might be given opportunity to present such evidence of changes both general and particular as have occurred since the year 1929 and are material to the issues raised by the Order of Inquiry herein, and also to the end that all parties might have opportunity to present such other things as might be material to said

issues; and further to the end that a general inquiry might be had into the reasonableness and lawfulness of each and every rate and charge, and each and every rule and regulation affecting any rate or charge stated in said new schedules known as Kansas City Livestock Exchange Tariff No. 3 and in the new schedules filed by the Farmers Union Live Stock Commission and the Producers Commission Association, respectively, on June 10, 1932, as aforesaid, and in any and all schedules of market agencies in effect at said Kansas City Stockyard at the time of the rehearing ordered by the Secretary. Accordingly, the Secretary, by an order dated July 15, 1932, vacated the aforesaid order of May 18, 1932, and directed a rehearing for the purposes aforesaid.

9. The rehearing ordered as above stated was held at the Kansas City Athletic Club Building in Kansas City, Missouri, by adjournment from the Federal Building in said city. The hearing began on the 6th day of October and was concluded on November 16, 1932.

10. By the order of July 15, 1932, granting a rehearing herein, the following additional parties were made respondents in the cause, namely: Ralph W. Wright and Wm. N. Baucus, partners doing business as Wright and Baucus Live Stock Commission Company; John Clay, F. H. Connor, Alan F. Wilson, and Chas. G. Smith, partners, doing business as John Clay and Company; L. E. Tice, doing business as Knight & Tice Sheep Commission Company; J. M. Laird and G. T. Laird, partners, doing business as Laird Bros. Live Stock Commission Company; Walter G. Land and John E. Maze, partners, doing business as Walter G. Land Live Stock Commission Company; Charles F. Viereggs and Robert H. Stover, partners doing business as W. M. Leitch Sheep Commission Company; H. E. Long, Robert B. Perry, and B. W. Perry, partners, doing business as Long-Perry Live Stock Commission Company; Martin, Blomquist & Lee Commission Company, a corporation; Grover C. Maxwell and Ben J. Furnish, partners, doing business as Maxwell & Furnish Livestock Commission Company; H. M. Baker, W. C. Bradshaw, Barney Metz, and

33 Louize McGrew Moffett, a partnership, doing business as the Moffett Live Stock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, partners, doing business as the Ragland, Storts and Burrus Live Stock Commission Company; Laurence Feaman and J. M. Nolan, partners, doing business as Feaman and Nolan; Stuart-Robinson-Hoover Company, a corporation; J. Less White and O. C. Seamans, a partnership, doing business as the Less White & Seamans Live Stock Commission Company; R. W. Wester and Joseph P. Smith, partners, doing business as Wester Bros. & Smith Commission Company; Clay W. Stephenson and T. Ray Graybill, partners, doing business as Graybill and Stephenson; Great Western Order Buying Company, a corporation; Dave Hamer, doing business as Dave Hamer Live Stock Commission Company; Harry Conley, W. H. Cripe, and J. Ed Freed.

11. At the time of the rehearing in this cause above described, the following respondents were not engaged in business at the Kansas City Stockyards; L. B. Andrews, doing business as L. B. Andrews Live Stock Commission Company; A. B. Bachman, doing business as A. B. Bachman Live Stock Commission Company; Charles N. Bird; Charles E. Blount, doing business as Charles E. Blount & Company; Gillespie & Jones Live Stock Commission Company; E. W. Goodson, G. E. Goodson, and O. C. Green, a partnership doing business as Goodson-Green Company; W. F. Burrus, doing business as Interstate Live Stock Commission Company; S. Kraus; L. Levy; H. B. Dorsett, doing business as M. K. & T. Commission Company; Roy W. Nance, doing business as Roy W. Nance Live Stock Commission Company; E. E. Sutton, doing business as O. K. Cattle Company; George P. Robinson and Joe R. Hoover, a partnership, doing business as Robinson-Hoover Commission Company; F. W. Banks and C. A. Rountree, a partnership, doing business as Rountree-Banks; E. F. Searls, doing business as George W. Searls & Son; Curtis A. Wood; W. E. Woodford, doing business as W. E. Woodford Live Stock Commission Company; and Ralph W. Wright.

12. By reason of changes in their organization, the following respondents had at the time of the rehearing herein ceased to engage in business at the Kansas City Stock Yards, under the firm name and style under which they were named as parties respondent in this proceeding; W. N. Baucus and Ira Kimmons, a partnership doing business as Baucus and Company; John Clay, F. H. Connor, C. A. Klemen, and J. G. Forrest, a partnership doing business as John Clay & Company; E. L. Knight and E. Tice, a partnership doing business as Knight & Tice Sheep Commission Company; J. M. Laird, G. T. Laird, and H. E. Laird, a partnership doing business as Laird Bros. Live Stock Commission Company; Walter G. Land, doing business as Walter G. Land Live Stock Commission Company; W. M. Leitch Sheep Commission Company; A. E. Long and Robert B. Perry, a partnership doing business as Long-Perry Live Stock Commission Company; Martin Bros. & Lee Live Stock Commission Company; Grover C. Maxwell, doing business as the Grover C. Maxwell Commission Company; T. S. Moffett, H. M. Baker, and J. M. McLain, a partnership doing business as Moffett Live Stock Commission Company; J. M. Ragland, W. B. Storts, and W. L. Burrus, a partnership doing business as Ragland, Storts and Burrus; William M. Schwartz, Joseph M. Nolan, and Laurence Feaman, Jr., a partnership doing business as Schwartz-Feaman-Nolan Company; C. A. Stuart, doing business as C. A. Stuart & Company; J. Less White, doing business as Less White Live Stock Commission Company; and Dan Wester, R. W. Wester, and Joseph Smith, a partnership doing business as Wester Bros. & Smith Commission Company. Frank Boddington, doing business as the Boddington Live Stock Commission Company, a respondent in this proceeding, died on October 14, 1932.

13. It appears of record that at the rehearing described in paragraph 9 hereof all respondents were present by counsel except Farmers' Union Livestock Commission; J. G. Jackson; McDonald Live Stock Commission Company; W. O. Park; K. L. Peterson, doing business as K. L. Peterson Order Buying Company; Producers' Commission Association; M. W. Rice and George E. Kirk, a partnership doing business as Rice & Kirk; Harry Conley; W. H. Cripe; and J. Ed Freed.

14. It also appears of record that Farmers' Union Live Stock Commission; McDonald Live Stock Commission Company; K. L. Peterson, doing business as K. L. Peterson & Company; Producers'

35 Commission Association; Harry Conley; and W. H. Cripe were duly served with a copy of the aforesaid order granting a rehearing in this cause. It does not appear of record that either J. G. Jackson; W. O. Parke; M. W. Rice and George E. Kirk, a partnership doing business as Rice and Kirk; J. Ed Freed, or any of them, were either present at the rehearing in person or by counsel or were served with a copy of the order granting rehearing herein. However, it does appear that John B. Gage, Esq., Attorney-at-law of Kansas City, Missouri, who appeared for most of the respondents, both at the original and the rehearing, announced at the original hearing that he represented M. W. Rice and George E. Kirk, a partnership doing business as Rice and Kirk, and there is nothing in the record of the rehearing to negative the continuance of such representation except that said record fails to show the inclusion of these respondents in the list of those stated by Mr. Gage as being represented by him.

15. Oral argument on the basis of the record made at the original hearing and at the rehearing was had before the Acting Secretary of Agriculture on March 24, 1933. Respondents' counsel was given until April 15, 1933, to file a brief, and so filed it.

Findings of Fact

Upon careful consideration of the entire record in this proceeding, the following findings of fact and conclusions are made:

I. The Kansas City Livestock Market

16. The Kansas City Stock Yards Company maintains and operates a stockyard at Kansas City, Mo., at which a public market is conducted. This market was established in 1871 and has grown in importance as the production of livestock has expanded and improved in the territory tributary to Kansas City until it has become one of the leading livestock markets in the United States. A stockyard is a place where producers and others ship their livestock by rail, or by truck, or drive them in on foot, to be offered for sale to the various

classes of buyers who resort there to buy the grades and classes of livestock to meet their requirements.

17. The geographical location of the Kansas City market makes it a gateway through which much of the livestock produced in the West and Southwest passes on its way to the feed lots in the Central West and the consuming centers in the East. Considerable numbers of hogs and sheep are sold at the Kansas City Market, but its primary eminence is as a cattle market. It is the largest stocker and feeder cattle market in the world.

II. Origin of Receipts of Livestock

18. The points of origin of receipts of cattle at the Kansas City market lie principally in the States of Kansas, Nebraska, Colorado, Arizona, New Mexico, Texas, Oklahoma, Arkansas, Missouri, and Idaho. The territory in which the drawing power of the Kansas City market is distinctly greater than that of its principal competing central markets is made up of the State of Kansas, the most southerly tier of counties in Nebraska, the counties of southeastern Colorado, those of the eastern half of New Mexico, those of the northern portion of Texas, the State of Oklahoma, the counties of western Arkansas, and those of the most westerly portions of Missouri. The hogs arriving at the Kansas City market originate in a more restricted area than do the cattle and sheep. The hog territory may be defined generally as the State of Kansas, south central Nebraska, northern Texas, eastern Oklahoma, western Arkansas, and the counties located in the western third of Missouri. The sheep arriving at the Kansas City market originate in a wide area, embracing the States of Kansas, Colorado, New Mexico, Arizona, Texas, Oklahoma, Missouri, and to some extent the far western and northwestern States.

19. Ordinarily, livestock tends to move from the producer to the consumer by that route which is most economical. The trade territory of a market is determined largely by those factors which make it the most economical center to, through, and from which to move the livestock. One of the chief factors delimiting the trade territory of a market is the rate structure of the railroad transportation system which serves it. Generally speaking there is a normal trade territory for a livestock market, and this is true of the Kansas City market. Within this trade territory the Kansas City market comes into competition to a varying extent with other markets for the livestock in the counties and states from which it receives its livestock.

20. The following table gives, by species, the total number of livestock marketed from the seven states of Kansas, Texas, Oklahoma, Missouri, Nebraska, Colorado, and New Mexico at Kansas City and four of its principal competing central markets, and the percentage of the total marketed at each:

CATTLE

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	4,864,862	49.5	3.0	14.5	21.4	11.6
1921	4,889,076	49.9	4.3	14.8	20.6	10.4
1922	5,803,333	50.4	3.7	13.9	21.4	10.6
1923	6,170,478	51.2	3.9	14.3	19.9	10.7
1924	6,262,311	48.4	5.0	14.3	21.3	11.0
1925	5,954,228	49.1	4.5	14.5	20.3	11.6
1926	5,778,123	44.7	5.2	16.5	22.6	11.0
1927	4,990,556	46.6	4.8	18.6	19.8	10.2
1928	4,841,510	44.9	5.7	15.5	22.3	11.6
1929	4,834,490	44.4	5.7	15.8	22.6	11.5
1930	4,888,804	44.0	4.9	16.3	23.9	10.9
1931	4,774,019	40.7	6.7	16.8	25.7	10.1

HOGS

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	7,030,618	32.1	0.8	18.9	27.4	22.8
1921	7,253,311	28.6	1.0	22.3	27.9	20.2
1922	8,413,567	28.8	1.6	23.0	26.3	20.3
1923	10,843,476	30.3	1.2	24.0	26.0	18.5
1924	10,400,432	26.3	0.9	24.0	29.9	18.9
1925	7,868,149	24.6	0.9	24.1	32.2	18.2
1926	6,980,344	27.6	0.7	25.8	28.2	17.7
1927	5,897,608	26.4	1.8	32.5	25.1	14.2
1928	8,362,044	28.1	1.1	24.8	27.6	18.4
1929	8,726,306	27.8	1.1	26.3	28.0	18.8
1930	7,995,230	24.9	0.8	25.6	32.1	16.6
1931	6,652,778	19.4	0.8	23.1	39.0	17.7

SHEEP

Year	No. marketed at 5 markets	Percent marketed at Kansas City	Percent marketed at Chicago	Percent marketed at Nat. Stkyds.	Percent marketed at Omaha	Percent marketed at St. Joseph
1920	3,060,016	47.9	14.7	12.3	7.6	17.5
1921	3,718,856	42.3	22.1	12.2	7.1	16.3
1922	3,327,947	43.6	20.7	13.4	6.7	15.6
1923	3,743,367	38.7	21.8	10.3	11.1	18.1
1924	3,454,973	41.5	17.6	9.6	9.2	22.1
1925	3,355,277	40.0	15.3	10.4	11.2	23.1
1926	3,676,427	43.2	14.3	11.2	9.6	21.7
1927	3,068,669	43.0	16.6	11.1	8.1	21.2
1928	3,736,678	42.6	10.2	8.2	10.8	28.2
1929	3,729,764	42.7	8.2	9.2	11.0	28.9
1930	4,301,577	42.8	11.2	8.7	12.6	24.7
1931	4,540,010	45.8	11.8	10.1	9.6	22.7

21. The use of county lines defines trade territory more nearly precisely than does the use of state lines. The record shows for the year 1927 the counties of origin classified on the basis of the comparative drawing power of ten important markets; namely, Kansas

City, Omaha, St. Joseph, Sioux City, St. Paul, Denver, 38 Wichita, National Stockyards, Chicago, and Sioux Falls.

Those counties which sent to the Kansas City public market a number of head of livestock representing from 75 to 100 per cent of the total rail shipments to all these ten markets were placed in one classification, and those counties which sent from 50 to 75 per cent to Kansas City in another. Other groupings were made of those counties in which the drawing power of Kansas City as compared with that of other markets was less pronounced. The results of this study of the rail receipts for the year 1927 are given in the following table:

	Total rail arrivals at the Kansas City public market from counties designated by percentage of Kansas City drawing power	The total rail arrivals at ten competitive markets, including Kansas City from these designated counties	The ratio of Kansas City rail arrivals from designated counties to total rail arrivals at the Kansas City public market (expressed as a percentage of the latter)
Cattle and calves:			
75% to 100% counties.....	1,265,656	1,425,234	53.6%
50% to 75% ".....	649,677	1,055,786	27.5%
Two combined (77% area).....	1,915,333	2,481,020	81.1%
Other counties (22.5% area).....	435,042		18.4%
Total receipts.....	2,350,375		99.5%
Hogs:			
75% to 100% counties.....	578,091	641,599	36.2%
50% to 75% ".....	444,568	720,847	27.8%
Two combined (75% area).....	1,022,659	1,362,446	64%
Other counties (25% area).....	542,695		34%
Total receipts.....	1,565,354		98%
Sheep:			
75% to 100% counties.....	433,767	469,819	29.3%
50% to 75% ".....	466,365	739,901	31.5%
Two combined (74% area).....	900,132	1,209,729	60.8%
Other counties (22.5% area).....	528,204		35.7%
Total receipts.....	1,428,336		96.5%

22. Within the trade territory made up of those counties which sent to the Kansas City stockyard from 50% to 100% of the live-stock marketed by rail at the ten important markets, producers do not always send their livestock through the central markets. They may ship directly to packers located at Kansas City, packers whose plants are not located at any central market, and to those located at points farther east. The record does not disclose the extent of sales at the so-called concentration points. It does show the direct purchases of the packers located in greater Kansas City from 1920 to 1931, inclusive, and for the first eight months of 1932. It shows also for 1931 the purchases by packers located away from Kansas City but in the 50% to 100% counties of the state immediately tributary to Kansas City. These purchases were as follows:

	Total	From public stockyards	Direct from country
Cattle.....	111,767	23,531	88,236
Calves.....	53,852	6,031	47,821
Hogs.....	1,934,394	71,160	1,863,234
Sheep.....	40,134	2,051	38,083

III. Manner of Arrival of Livestock at Market

23. Presently practically all livestock handled by respondents arrived at the Kansas City stockyard either in railroad cars or motor trucks.

24. Until comparatively recently arrivals of livestock were practically exclusively by rail. Formerly it was the custom of one owner to load one species in one or more railroad cars and consign such livestock to a market agency for sale. Under these conditions of transportation and ownership the consignment came to be thought of in terms of the straight car with single ownership and the rates were assessed in terms of cars. In those days multiple car consignments containing livestock of one species and ownership were much more common than at present, such consignments in train loads of 15 or more cars not being infrequent. With the more intensive settlement of the livestock producing territory tributary to Kansas City, with changes in transportation and marketing conditions, the custom arose not only of shipping consignments consisting of fewer cars but also of mixing species within a car and shipping in the same car livestock belonging to different owners. This brought about in the tariffs or schedules of charges rates per head of livestock to be applied to less than a carload of one species.

25. Not all of the cars used by the 13 railroads serving the Kansas City market are of the same length or same weight capacity.

40 Some of the roads use 36-foot cars, others 40-foot cars. The custom has grown up on the part of those railroads using mainly 36-foot cars of furnishing two such cars when a 40-foot car is ordered by a shipper, and billing the two cars as one. The respondent market agencies assess their charges according to the billing. Some of the roads, in order to meet truck competition, have reduced the minimum weight allowable and have reduced their carload rates accordingly.

26. With the development of the motor truck and the construction of hard surfaced and other improved roads leading from the producing areas to Kansas City, there came another change in the manner of arrival of livestock at the market, namely, the gradual decrease in the percentage thereof arriving by rail and a corresponding increase in that coming in by truck. The record shows these percentages for each year from 1922 to 1931. It will be observed from the following table that in 1922 only .95 per cent of cattle, 5.58 per cent of calves, 5.49 per cent of hogs, and 7.11 per cent of sheep arrived by truck, while in 1931 the corresponding percentages were cattle 11.15 per cent, calves 35.16 per cent, hogs 51.55 per cent, and sheep 13.39 per cent.

Year	Cattle		Calves	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1931.....	88.85	11.15	64.84	35.16
1930.....	92.19	7.81	72.99	27.01
1929.....	94.59	5.41	78.21	21.79
1928.....	96.52	3.39	82.40	17.60
1927.....	97.64	2.36	81.88	18.12
1926.....	98.16	1.84	86.34	13.66
1925.....	98.56	1.44	90.34	9.66
1924.....	98.93	1.07	92.84	7.16
1923.....	99.09	.91	93.65	6.35
1922.....	99.05	.95	94.42	5.58
	Hogs		Sheep	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1931.....	48.45	51.55	86.61	13.39
1930.....	60.78	39.22	88.83	11.17
1929.....	71.37	28.63	89.71	10.29
1928.....	78.00	22.00	91.99	8.01
1927.....	83.02	16.08	91.74	8.26
1926.....	88.45	11.55	93.75	6.25
1925.....	91.12	8.88	94.46	5.54
1924.....	93.28	6.72	94.74	5.26
1923.....	95.42	4.58	94.13	5.87
1922.....	94.51	5.49	92.89	7.11

41 The above stated percentages are calculated from the total receipts of livestock by rail and by truck, respectively, as compiled by the Kansas City Stock Yards Company. Those totals contain livestock such as that stopped at Kansas City for feed, water, and rest, and that shipped direct to packers through the Kansas City stockyard, neither of which classes is handled by any of the respondents. The record shows the arrivals by rail and by truck, respectively, of the livestock handled by respondents for only the years 1929 and 1931. The following table shows the percentages arriving by rail and by truck, respectively, of the total fresh revenue producing receipts of livestock handled by respondents. By "total fresh revenue producing receipts" is meant the total livestock on which respondents received commissions, exclusive of livestock bought, livestock handled for dealers, and livestock handled for other market agencies.

Year	Cattle		Calves	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1929.....	94.21	5.79	74.71	25.29
1931.....	88.43	11.57	58.21	41.79
	Hogs		Sheep	
	Rail per- cent of total	Truck per- cent of total	Rail per- cent of total	Truck per- cent of total
1929.....	67.25	32.75	90.77	9.23
1931.....	38.49	61.51	86.60	13.40

27. Comparison of the above percentages for the years 1929 and 1931 with those contained in the next preceding table indicates that a greater proportion of the livestock handled by respondents arrives by motor truck than is true of the total livestock which passes through the stockyard. Respondents' tariffs have contained for many years per head rates for selling livestock trucked or driven-in to the stockyard. Quite uniformly these rates have exceeded those charged per head for livestock arriving by other modes of transportation.

28. Not only changing modes of arrival but other factors, such as market demand and the customs of buyers, have caused the number of animals per consignment and per draft to decrease. In other words, increasingly respondents' business has taken on more of the aspects of the retail handling of a commodity. These changes have brought with them increasing costs per head of livestock handled, but such costs are included in those hereinafter stated in detail.

42 29. The foregoing developments caused the great majority of the respondents to reach the conclusion that tariff structures, which had had their inception in the days of the exclusive carload business and which, in spite of some modifications, were still based on the carload as the unit, had ceased to fit the business which respondents were doing. Accordingly, between the time of the first and the last hearing in this proceeding, those respondents filed their Tariff No. 3 which, to a considerable extent, discards the carload as the unit of charge and bases its rates on the head of livestock of each particular species regardless of the mode by which such livestock arrived at the pens of the respective respondents.

IV. The Facilities of the Market Place

30. The Kansas City Stock Yards is located in Missouri and Kansas, in that part of the central industrial district of Kansas City known as the "West Bottoms." The yard is divided into three sections. The west yard lies on the west side of Kansas River and was formerly used as a quarantine yard. The main yard lies on the east side of the Kansas River and includes the cattle, hog, sheep, and horse and mule divisions, in addition to the exchange and show buildings. The north yard lies north of the main yard and is connected with it by an underpass beneath the Union Pacific and Missouri Pacific railroad tracks. With rare exceptions, the buying and selling of livestock are carried on in the main yard.

31. The Kansas City market is served by 13 trunk line railroads and by the Kansas City Connecting Railroad, which owns rights-of-way, tracks, and loading and unloading docks and chutes, thus affording adequate transportation facilities in connection with the loading and unloading, receiving and delivering of livestock at the stockyard. It is the terminal carrier which forms the connection between the stockyard and all railroads entering Kansas City.

32. The main yard is generally triangular in shape, the base of the triangle being at the north end of the yard. There are five railroad docks on the west side of the main yard, extending in a north and south direction. Three of these docks lie between the river and the hog house, and two lie between the hog house and the cattle division. These five docks have approximately 500 unloading chutes.

43 33. The hog house is a three-story structure, rectangular in shape, extending in a north and south direction between the two sets of railroad docks. The respondent commission firms use the pens on the second floor of the hog house for selling hogs. The ground floor is used for holding cattle which are not delivered to the respondent firms immediately upon arrival, and for holding livestock which is to be shipped out of the yard. Those respondents who are engaged solely in the business of buying hogs on order use a part of the third floor of the hog house for sorting and preparing livestock for shipment. The remainder of the third floor is used for holding livestock to be delivered to packers, and a part of the roof of the hog house is covered with pens and used for the same purpose. The unloading docks and receiving pens for hogs arriving by truck are located in the north yard. Hogs unloaded there must be driven through the underpass which connects with the main yard at the north end of the hog house.

34. The cattle division lies between railroad dock No. 5 and the public thoroughfare which bounds the yard on the east. This division is not under roof and is on the ground floor. However, the scales are on viaducts, with the exception of two cattle scales which are on the surface in the traders' division. The pens and alleys in the north and, to some extent, the west part of this division are used by traders who buy and sell the different classes of cattle and calves. The commission division of the cattle yard is rectangular in shape, extending in a north and south direction, adjoining part of dock No. 5 and part of the traders' division on the west. The respondent firms have pens assigned to them in this division, in which cattle and calves are exposed for sale. There are unloading docks and receiving pens at the north end of the main yard where cattle and calves are received from trucks and later driven to the commission division.

35. The sheep barns are located in the southern part of the main yard. There are three of these barns, each being a one-story structure. The unloading docks for drive-in sheep, and the sheep dipping vat are located in this division.

44 36. The plant and pens used in connection with the immunization of hogs are situated in the southwest corner of the cattle division. The dipping vat and branding chutes for cattle and calves are located in the north yard. There is also a stock hog division in the north yard where stock hogs may be handled without

the necessity of dipping and immunizing, if they are not brought into the main yard. This division is for the purpose of encouraging the movement of stocker and feeder hogs through the public market. If such hogs are taken to the main yard to be sold or weighed, they must be dipped and immunized in accordance with State and Federal regulations.

37. The Kansas City Stock Yards Co. owns an office building, commonly called the Exchange Building, which is located midway on the east side of the cattle commission division. In addition to housing its own offices in this building, the company leases office space to respondents and others having business at the market. Opposite the Exchange Building and on the west side of this division is the train office building where the records of incoming and outgoing shipments are made. It is a sort of clearing house for the detailed information relative to the movement of livestock to and from the market.

38. Livestock arriving at the Kansas City market by rail is unloaded by employees of the stockyard company, which acts as agent for the carriers, who pay the company for this service. The loading and unloading facilities of the Kansas City Connecting Railroad are connected with an extensive system of viaducts, alleys, stock drives, subways, and bridges, which afford adequate facilities for receiving and distributing livestock to all parts of the stockyard.

39. In each division of the yard adequate scale facilities are provided by the stockyard company. There are three scales in the sheep division, one of which is designed for weighing truck consignments. There are 14 scales in the cattle commission division. These scales, the sorting and catch pens, and alleys used in connection therewith, are elevated above the pens and alleys on the ground level. They are reached by inclines and viaducts. These scales are arranged in pairs, one scale in each pair being called the "high line" scale and used for weighing drafts of 10 head or more, and the other the "jack pot" scale and used for weighing small drafts. At the west side of the

45 cattle yard there is a small scale maintained for the purpose of weighing crippled hogs. There are five scales maintained in the hog commission division on the second floor of the hog house.

40. Upon the arrival of livestock by rail at the stockyard a waybill, representing each carload, is delivered by an employee of the railroad company to employees of the stockyard company. Information as to the dock number, the time at which the train is set, names of consignor and consignee, the state of origin, car number, and class of livestock in the consignment is taken from the waybill and placed on the bulletin board by the stockyard company. These bulletins are hung in the lobby of the train office building, where they are consulted from time to time by representatives of the respondent firms for the purposes of ascertaining what livestock may have ar

rived consigned to them. After livestock is unloaded at the yard, the dock foreman, a stockyard employee, places a copy of the record of each car in a designated place in the chute alley, and representatives of commission firms consult these records to determine the location of livestock consigned to their respective firms.

41. Cattle and hogs arriving by rail are delivered to the respondent firms by the stockyard company at the unloading chutes. If their representatives are not at the unloading chutes to take delivery before the chute pens are needed for unloading, other livestock, the stockyard company yards the livestock in convenient pens near by. Under such circumstances the hogs are usually taken to the pens on the second floor of the hog house, and cattle are yarded in pens on the ground floor of the hog house. The representatives of the respondents then call for the livestock at these divisions. Sheep arriving by rail are delivered to the respondents' pens in the sheep barns by the stockyard company. In the case of cattle and hogs arriving by truck, the respondents are required to drive the livestock to their own pens from the truck unloading chutes or near-by pens. Sheep arriving by truck are unloaded at a convenient place in the sheep division and are driven to the sale pens by the stockyard company.

42. The stockyard company tags all animals arriving crippled or dead, in order that they may be properly identified. There is an arrangement whereby a rendering company gathers up the
46 dead animals and removes them to its plant, remittance therefor being made to the commission firms by the rendering company. Crippled hogs are gathered up by the stockyard company and delivered to a "crip" scale, where they are weighed and are then removed by the packers who purchase them. There are two associations which engage in the business of handling crippled cattle and sheep from the yards direct to the packing plants. Such crippled livestock is purchased on a salvage basis, and remittance is made to the commission firms to which the livestock is consigned. These associations make a special charge for this hauling service. This charge is deducted from the proceeds of the sale of the animals.

43. The stockyard company furnishes all the feed fed in the yards. It delivers the feed to the commission men's pens and feeds the livestock. Water and facilities for watering in each pen are also provided by the stockyard company. Employees of the respondent commission firms turn the water on. It frequently happens that the stockyard company will turn the water off. The stockyard company cleans the pens and maintains tractors, trailers, and other necessary facilities for removing debris. In seasons of bad weather, or on other occasions, the respondent firms may clean their own pens. Such cleaning consists in throwing the manure to one side of the pen or under the troughs. The employees of the stockyard company remove it later.

44. The stockyard company maintains weighmasters who operate the various scales and issue scale tickets containing information relative to each draft weighed. It also provides a man who assists in putting the livestock on the scales to be weighed, and a suitable force of employees to receive and yard the livestock when it is driven off the scales.

45. For its services and use of its facilities heretofore described the stockyard company makes a yardage charge on a per head basis and a separate charge for feeding. Respondent deducts these charges from the gross proceeds of sale of the livestock and pay them to the stockyard company. Separate charges are made by the stockyard company for services and use of facilities in connection with the branding, dipping, testing, immunization, or other special
47 services. Usually these special services are required in connection with the movement of livestock from the market back to the country, and the charges therefor are paid by the purchasers. If for any reason any of these services should be required by the shipper of livestock to market, the charges would be deducted from the proceeds of the sale of his livestock.

46. After livestock has been sold and weighed, it is yarded and held in pens by the stockyard company for delivery to the purchaser, or until it can be loaded, if it is to be shipped to points outside the market. If the livestock is to be shipped, the employees of the stockyard company load it on the cars. This service is rendered by the stockyard company as agent for the carrier, and a separate charge is paid by the carrier.

47. The Kansas City Stock Yards Co. endeavors through advertising and soliciting to induce shippers to consign their livestock to market for sale, and to attract buyers for such livestock. It maintains a force of employees in the country who make contacts with producers and growers of livestock. These men have knowledge of market conditions and the various grades and classes of livestock. The stockyard company maintains an information bureau which keeps in touch with the field representatives and gives them current market information. They assist farmers and producers in sorting and grading their livestock, disseminate useful market information, and endeavor to obtain shippers for the Kansas City market. They do not attempt to influence the shipment of livestock to any particular commission firm.

48. A branch of the United States Department of Agriculture maintains an office at the stockyard, which is a service organization having for its purpose the collection and dissemination of market information. This office maintains a bulletin board in the Exchange Building on which it posts information in regard to the estimated receipts at Kansas City, and other leading livestock markets of the country, the prices and trend of prices at the various markets, and

the prices of dressed meats in Philadelphia, Boston and New York. Facts as to local market conditions are obtained by employees of that office, who are regularly assigned to different divisions of the yard for the purpose of making contacts with salesmen and buyers.

48 A system of leased wires is maintained whereby similar facts are readily obtained from other markets. In addition to posting information from time to time on the bulletin board throughout the day, this office disseminates it by radio at three different periods, furnishes it to the telegraph companies and to the press associations, and publishes a mimeographed report, which circulates extensively among producers and others in Kansas, Missouri and, to a certain extent, in other states. The informational service of this office is available to all who request it.

V. Disposition of Livestock Receipts

49. Livestock received at the Kansas City market falls into two general classes: (1) stockers and feeders, and (2) killers or butcher livestock. The demand for the stockers and feeders comes principally from those producers who are equipped to feed and finish livestock either in feed lots or on pasture lands. The livestock ready for slaughter is purchased by local packers and butchers and by packers located at distant points. The chief outlet for this class of livestock is the local packer demand. Contiguous to the market are located the plants of the four large packers, Swift, Cudahy, Wilson, and Armour. There are also small packers and local butchers who cater principally to the local demand for dressed meats and meat products. The outside packers usually make their purchases through order buyers, who are regularly engaged in that business at the market. Local packers and butchers are customarily represented on the market by salaried employees. Feeders and finishers generally purchase livestock through commission firms, although they sometimes make their own purchases. There are also dealers at the market who buy for the purpose of reselling at a profit, either on the Kansas City or some other market, without slaughtering, and also without feeding such livestock to any great extent. Although dealers operate to some extent in connection with the handling of all classes of livestock, their principal activity at the Kansas City market is in buying and selling stocker and feeder cattle. Their function is primarily that of buying unsorted lots and small lots of cattle, which they later sort into different grades and classes to meet the requirements of the feeders and finishers. The disposition of the livestock received at the Kansas City market each year from 1920 to 1931, inclusive, was as follows:

CATTLE AND CALVES

	Local slaughter	Stocker and feeder shipments	Other shipments
1931.....	850,553	653,457	440,330
1930.....	1,006,989	712,064	426,012
1929.....	1,048,709	729,480	378,908
1928.....	1,029,385	779,707	375,680
1927.....	1,335,552	755,867	356,610
1926.....	1,459,204	761,119	378,231
1925.....	1,631,053	907,686	351,764
1924.....	1,552,429	997,601	442,221
1923.....	1,559,364	1,161,540	437,806
1922.....	1,406,843	1,151,256	383,208
1921.....	1,199,893	787,904	456,454
1920.....	1,263,882	778,214	431,290

HOGS

1931.....	836,654	54,852	443,994
1930.....	1,090,134	74,915	841,036
1929.....	1,454,334	104,097	907,374
1928.....	1,706,286	104,841	570,085
1927.....	1,385,208	98,310	411,963
1926.....	1,427,208	110,087	482,513
1925.....	1,236,506	66,528	764,856
1924.....	1,871,991	134,287	930,753
1923.....	2,721,412	282,900	606,340
1922.....	2,052,229	161,753	426,313
1921.....	1,712,834	93,505	392,910
1920.....	1,838,080	200,196	401,618

SHEEP

1931.....	1,433,778	257,774	563,279
1930.....	1,518,225	252,418	248,548
1929.....	1,290,177	261,722	196,120
1928.....	1,270,207	350,675	156,789
1927.....	1,124,604	353,591	137,927
1926.....	1,202,043	358,983	205,433
1925.....	1,045,517	318,655	140,256
1924.....	1,046,447	367,648	150,377
1923.....	1,100,978	406,930	147,139
1922.....	1,600,200	385,282	172,756
1921.....	1,307,428	324,150	160,512
1920.....	1,065,832	474,409	148,603

The above table does not include direct shipments to packers except in those cases in which such shipments pass through the Kansas City stockyard. The direct shipments contained in the local slaughter of hogs shown above was for the same period as follows:

1931.....	180,000
1930.....	159,000
1929.....	373,171
1928.....	323,787
1927.....	226,831
1926.....	161,500
1925.....	182,458
1924.....	206,470
1923.....	382,709
1922.....	187,360
1921.....	153,461
1920.....	31,859

50. The demand for livestock in Kansas City, and especially that for hogs, is greater than that supplied by the livestock arriving at the public market. Large numbers of hogs destined for local slaughter in Kansas City do not pass through the stockyard. In

addition to the hogs received through the stockyards the packers received at their plants located at Kansas City 1,679,138 in 1929, 1,185,258 in 1930, 1,478,960 in 1931, and 1,319,519 from January to August, inclusive, 1932.

VI. Business in Which respondents are Engaged

51. In the early development of the West, drovers were accustomed to bring their livestock to a convenient point at the junction of the Kansas and the Missouri rivers and there sell it. With the development of trading in livestock at this central point there grew up a more firmly established and permanent market place. Some of those who resorted there sold not only the livestock which belonged to them but undertook the selling of that belonging to others. Later, resident selling agencies were developed which devoted their attention exclusively to the handling of livestock for others at the central market. While it is the privilege of the owner or shipper of livestock to the Kansas City public market to sell his own livestock, the complicated machinery of the market place, which the selling agencies and the stockyard company have worked out for their own convenience, make it a practical necessity for the producer to consign his livestock to some regular selling agency for sale. A like situation prevails with respect to many who seek to buy livestock on the market. They may neither be able to come to the market in person nor find it to their advantage to maintain employed buyers. A demand has developed, therefore, for the services of those who stand ready to act as representatives of the buyers on the market. There have

51 come into existence two somewhat distinct classes of operators. The first consists of what is commonly known as commission firms. They hold themselves out to the public both to sell and to buy livestock on a commission basis. Generally speaking, the buying operations of commission firms constitute a small part of their total business. The second class is made of that group of respondents commonly known as order buyers. They specialize in buying livestock on order and do no selling on a commission basis.

52. The nature of the business in which the respondents are engaged is such that it may be carried on under different types of organization. Among the respondent firms there are individual proprietorships, partnerships, and corporations. One of the respondent firms is operated as the branch house of a firm maintaining its principal headquarters at another market. Two of the respondents are organizations of producers engaged in operating on a co-operative plan. These return their profits, or a portion of them, if any, to the members on a patronage basis. Four of the respondent firms are registered to handle sheep only. All others engaged in selling and buying livestock hold themselves out to the public to handle cattle, calves, hogs, and sheep. Some order buyers specialize in the handling of one species of livestock and others handle all species.

VII. Service Rendered by the Respondents

53. The livestock commission business carried on by the respondents is conducted on the premises of the stockyard company. The physical handling and caring for the animals and their selling and weighing, take place in pens belonging to the stockyard company and assigned by it to the various respondents. The office work growing out of the sale of the animals and the accounting to the owner for the proceeds of sale is carried on in the Exchange Building also owned by the stockyard company. The respondents do not pay for the use of the pens but pay rent for the office space which they occupy in the Exchange Building. The rendition of the services of selling and buying livestock makes it necessary for the respondents to employ assistants in the yard and in the office. There is a wide variation among the firms as to the character of their organization and

in the extent to which work can be specialized. A relatively
52 small volume of business does not permit of that degree of specialization which is possible in the case of a firm which receives a large volume of business. Most of the larger firms have a separate department for each species of livestock handled and usually place a head salesman in charge of each department. In some instances divisions exist within a department as, for instance, in the case of those firms which handle a large volume of business. Such firms may have a fat steer division, a stocker and feeder division, a butcher cattle division, and a calf division. On the buying side of the market each buyer is generally looking for a specialized grade or class of livestock. Those packers who are represented by salaried buyers have special buyers for the different grades and classes of cattle. Specialization has not been carried to the extent in the case of hogs and sheep that it has in the case of cattle. Order buyers are usually in the market for distinct grades and classes of livestock. Dealers generally do not specialize to any great extent. Their market function is to buy mixed grades and classes of livestock and then to sort them in accordance with the needs of the trade. In some cases the owner, or owners, of a small firm do much of the yarding and office work in addition to the selling of the livestock.

54. The situation with respect to specialization among salesmen applies in general to the yarding and office work. The large firms divide their help into divisions in the cattle alleys and place each division in charge of a head yardman. In the larger firms the various office employees are frequently assigned to special tasks or departments under the supervision of an office manager. As a general rule the yard work is heaviest in the early part of the day and the office work heaviest in the latter part of it. Because of this, some of the office employees may assist in the yard work in the forenoon and some of the regular yard employees may help in the office in the afternoon. The organizations are flexible and permit a high degree of cooperation among the employees of a firm.

55. Some of the respondent firms do not have sufficient livestock of certain species to warrant the maintenance of a selling organization. Many firms, for instance, do not have sheep salesmen. These firms engage the salesmen of some other firm. This arrangement concentrates the selling and yarding of sheep in the hands of a comparatively few firms, and thus makes possible a high degree of efficiency. A firm which does not elect to sell the sheep consigned to it assesses the regular commission charge against the consignor and with a part of this revenue pays someone else for selling the sheep. Each firm handles all the office and accounting work growing out of the sale of sheep consigned to it. An arrangement similar to that described for the handling of sheep is sometimes entered into with respect to hogs and cattle, but in the case of the latter species the arrangement is less frequent than in the case of sheep. A few firms do not maintain their own office force but engage other respondent firms to do their office work for them.

56. Most of the livestock received for sale at the Kansas City market arrives during the early morning hours. It is important that the livestock be handled expeditiously in order that it may be watered, fed, and sorted in time for the market. The bulletins prepared by the stockyard company with respect to the arrivals of livestock are hung in the train office building, and there respondents' employees go to obtain information as to arrivals. Frequently they obtain additional information in regard to consignment from letters, telephone calls, and personal contact with shippers. As soon as the information is obtained, the representative of the commission firm goes to the designated place near the track where the livestock is unloaded and obtains a chute slip showing the car number and the number of chute in which the stockyard company has placed the livestock.

57. Rail arrivals of sheep are driven from the unloading chutes to the pens of respondent market agencies, and formal delivery is made there. Cattle and hogs arriving by rail are delivered to the respondents at unloading chutes or near-by pens. After the representative of the commission firm has ascertained the pen in which the livestock has been placed, he goes to the representative of the stockyard company who is in charge of the particular division, and requests delivery. This representative of the commission firm is usually called a "train runner." The livestock is counted out of the pen into the alley, and a train runner then goes ahead of it, leading the way to the pens assigned to his firm. In the case of cattle

54 and calves delivered at the unloading chutes, the stockyard company furnishes a man to go behind each load of livestock. During periods of heavy runs a train runner may lead a procession containing a number of carloads, each kept separate from the other by a stockyard employee. Such assistance is not furnished by the stockyard company in the case of driving hogs, nor in those instances where cattle are yarded temporarily in holding pens. When live-

stock reaches the pens of a commission firm, it is counted into the pens, usually by the head yardman for that firm. In the case of night arrivals during the season of heavy runs of cattle, some firms maintain a night train runner, either as an individual employee or one employed jointly with other firms.

58. Pens are assigned to the various commission firms in the different divisions of the yard. These assignments are made by a committee. The number of pens assigned to each firm is governed by the volume of business handled, and the location is governed largely by the length of time during which a firm has been in business.

59. Sheep arriving by truck are delivered at the sheep division. With respect to truck arrivals of hogs and cattle, it is necessary for the respondents to drive the livestock from the truck unloading chutes or near-by holding pens to their respective pens in the regular divisions. This work is accomplished either through individual employees or through those who make it their business to drive livestock at a stipulated head charge. The stockyard company makes available information in regard to truck arrivals of livestock through notification slips placed in boxes at the respective drive-in unloading chutes.

60. In taking custody of livestock consigned to them for sale respondents' employees make such records and memoranda as will enable them to preserve the identity of each consignment. Through experience gained in handling livestock, these employees can often identify animals once they have seen them. Frequently a consignment of livestock is owned by two or more people. Such livestock is usually marked in some distinctive way in order to maintain the identity of each owner's livestock. There are also frequent shipments of branded livestock, and these brands serve as a basis for identifying ownership.

55 61. Occasionally some of the livestock contained in a consignment is intended for a market agency other than the one to which it is billed. Such livestock is placed in a separate pen. The receiving agency then notifies the firm to which the livestock is to be delivered, and that firm removes the animals to its pens.

62. Traders who buy and sell in the yard for profit sometimes place their livestock with the respondent firms to be sold. This is called "planting" and such livestock is referred to as "seconds." In such cases the traders usually drive their livestock to the commission firms' pens.

63. Upon receipt of livestock in its pens an employee of the commission firm, usually the head yardman, orders feed from the stockyard company, which maintains the equipment for the delivery of the feed and employees who do the feeding. The employee of the commission firm keeps the record of the amount of feed ordered. Sometimes the head yardman will sort and grade the livestock before feeding. As soon as it has been fed and graded, it is watered. Frequently when pens are available, a consignment of livestock will be divided into several bunches in order to enable the animals to drink

with less confusion. Some of the work of preparing livestock for sale is done by the yardmen. When the salesmen arrive in the yard they may do further sorting and grading.

64. The regular market hours are from 8 a. m. to 3 p. m., but the stocker and feeder class of livestock may be bought or sold at any time. Salesmen usually go to their offices some time before the market opens and review available information, in order that they may judge the trend of the market. In many instances salesmen have seen the cattle in the country before they were shipped. Frequently the owners telephone or write to the salesmen about the shipment. Sometimes shippers will accompany their shipments and give the salesmen helpful information in regard to the livestock to be sold. Salesmen also check up on the condition of the previous day's market. They obtain similar information in regard to the other livestock markets. They ascertain the estimated receipts of livestock at the Kansas City market and other markets for that day and opening prices for the day at other markets, in so far as such information is available.

56 65. The salesman then goes to the yard to look over the consignments and does whatever sorting is, in his opinion, necessary. When the market opens the buyers go to the pens where they, in company with the salesman, look at the livestock. According to the custom of the market only one buyer is taken into a pen at one time. If the livestock is suitable for the buyer, an offer and a bid are made. If a sale is not consummated, the buyer goes on to some other salesman, and the livestock is shown to the next buyer. On some days the buyers are very active and go out into the yard as soon as the market opens. On other days the buyers go out late in the forenoon and are slow to buy. There are many factors, the more important of which are the activity of the consuming demand and the supply of livestock, which determine whether a market is active or dull. It is bargaining among salesmen and buyers which finally determine what the market prices for the various grades and classes will be each day. The market may be strong at one time of the day and weak at another time. It is necessary that salesmen study the forces which affect the market from hour to hour, in order to determine in their own mind the best time at which to sell their livestock. Sometimes, although not frequently, a shipper will instruct a salesman not to sell livestock under a stipulated price. However, generally speaking, the shipper leaves this matter to the judgment of his salesman. In addition to the study of information in regard to supply and demand as factors affecting prices, a salesman must also be a judge of the factors which affect the value of livestock. In view of the fact that there is a wide margin between the prices paid for the highest quality of cattle and the lower grades of cattle, it becomes a very responsible task for a salesman to judge accurately the grades of cattle which he has to sell.

66. Once the market is made, sales are consummated rapidly, and the movement of livestock to the scales for weighing begins. The yardmen usually drive the livestock to the scales, although the

salesmen in some instances assist in this work. As soon as sales are consummated the salesman gives his yardman information in regard to the names of the owner and the buyer, and how the livestock is to be weighed, if special sorting at the scales is required
57 by the buyer. The yardman gives the weighmaster the information as to the owner and purchaser of the livestock when the livestock is driven on the scales. The weighmaster records this information on the scale ticket. When the livestock is driven off the scale, it becomes the property of the purchaser, and the employees of the stockyard company take possession of it and yard it for the buyer. Copies of scale tickets are taken by the yardman to the salesman, either in the yard or in the office, and the salesman marks the price thereon.

67. Respondents also assume certain responsibility in connection with the determination of the credit of the buyers of livestock. They know those who are members of the clearing house and do not hesitate to sell livestock to such members. If the prospective buyer is not a member of the clearing house, it is necessary to investigate his credit. A large percentage of the purchases are made by those whose credit is already known to respondents' salesmen.

68. The price of crippled and dead animals is determined upon a salvage basis. Standing arrangements are had with the Standard Rendering Company in connection with the price paid for dead animals, and similar arrangements with packers govern the determination of the prices paid for crippled animals. In this manner the crippled and dead livestock can be handled promptly and with the greatest convenience to all concerned.

69. In the cattle division there are many small lots of livestock to be weighed. There are frequent drafts consisting of only one or two head. This condition prevails especially in connection with the many grades and classes of butcher livestock. The larger commission firms maintain what is known as a "jack pot" man. He is one who possesses the peculiar ability to identify many different animals as to ownership and buyers. As a salesman consummates the sales of these individual head or small lots, he advises the "jack pot" man, who turns the animals into the alley. When he has accumulated a convenient number of head, he drives them to the scale where he sorts them according to ownership and purchaser. Special scales are maintained for weighing "jack pots." This procedure makes it possible to economize in time and equipment in handling this character of business.

58 70. Those who are engaged in the business of buying livestock undertake to inform themselves in the same way as the salesmen do. Those who buy livestock on order will make a survey of the livestock in the yard to determine the supply of those classes and grades which are suitable to their orders. After they find a good supply of the kind of livestock which they know some of their customers use in their trade, they may telegraph or telephone to their customers, give an estimate of the price, and the prospect of obtain-

ing supplies that will meet their particular requirements. Sometimes these customers place standing orders with their buying representative at the market. Frequently customers come to the market and accompany the buyers as they go about the yard looking for the kind and class of livestock desired. Sometimes order buyers will buy livestock when the price appears favorable and then obtain the orders later. One of the chief qualifications of a buyer is to be able to judge the killing qualities of slaughter livestock and the feeding and finishing qualities of stockers and feeders. In case the customer is a countryman or some one not known to the buyer, it is necessary to investigate his credit. Usually those who are not regularly engaged in business at the market do not pay cash or the equivalent of cash for their livestock. The order buyer must pay for the livestock promptly, and in many cases it will be several days before payment by the customer is realized.

71. If livestock is purchased to be shipped out, the buyer orders the necessary cars from the railroad company as soon as the purchase is made. Then he ascertains the number of head and the pen in which the livestock is held, and gives this information to the railroad. In case of stocker and feeder livestock which is bought to go back to the country, there are certain incidental services which may be necessary, such as branding, dipping, dehorning, and vaccination. Although these services are performed by the stockyard company, the yardman for the buyer supervises such operation. When the livestock is ready for shipment, the loading out is done by the stockyard company's employees. It is customary for a yardman or someone representing the buyer to supervise this work.

59 72. The office work in connection with the buying and selling of livestock consists primarily in rendering accounts to shippers and purchasers and making remittances and collections, as the case may be. Forms known as account sales are used in rendering accounts in the case of livestock sold. One of these forms is prepared covering each consignment, showing the name of purchaser or purchasers, the number of drafts, the number of head, weight, and price of each draft, gross proceeds, items of expense such as freight, feed, yardage, commissions, and other deductible items, and the net proceeds. A copy of this is sent to the owner. In case of plural ownership consignments the accounting may be handled as in the case of single ownership consignments, in which event the prorating is done at the shipping point. However, it happens frequently that a commission firm is requested to do the prorating, which consists in figuring the gross proceeds of sale of each owner's livestock, the various expenses prorated to each owner, and the net proceeds of sale of each. Sometimes a request is made for individual account sales for each owner in a plural ownership consignment. In connection with the purchase of livestock an account purchase is prepared somewhat in the same manner as an account sale, giving the details as to the transaction, including the cost and any local expenses, such as com-

missions. Bills for the purchase of livestock which are presented are checked before the account purchase is made out.

73. The respondent market agencies which are engaged in selling livestock have followed the practice for a number of years of remitting the proceeds of sale of livestock through the bank. Usually the shipper will designate the bank to which he desires that the proceeds of sale be sent. Respondents have available to them information with respect to the various Kansas City banks which are correspondents of the local banks throughout the Kansas City trade territory. As soon as the net proceeds of sale have been computed, a commission firm will place an order with its bank to deposit the proceeds to the credit of the shipper at his bank. If requested, this transaction is handled by telegraph rather than by mail. A special effort is made by all market agencies to remit as promptly as possible, and the remittances are made as soon as the net proceeds of sale of each consignment can be ascertained, even though the collections from the buyers have not been made. Usually remittances of proceeds

60 from the sale of truck-in livestock are made by firm check.

In some cases such proceeds may be remitted through the bank or by cashier's check. Most of the collections are made through the clearing house. The packers, order buyers, and brokers who clear traders are members of the clearing house, and under the rules of that organization there are certain time limits within which they must remit through the clearing house for the livestock which they have purchased. Order buyers usually draw drafts upon their customers as soon as the livestock has been shipped, or they may take their customer's check. It seldom happens that a customer in placing an order will advance the cash.

74. Salesmen and members of respondent firms spend considerable time in the office interviewing shippers. This is done usually after the selling is completed. If shippers are not at the market, a salesman will write a letter to each one for whom he has sold livestock that day, giving information in regard to the transaction and such other general market information as he may deem helpful to his customer. However, this is not always done with respect to livestock received by truck.

75. There exists an arrangement between each of the respondents and the stockyard company whereby the latter, acting as agent of the carrier, will make formal delivery of livestock before freight charges on the consignment are paid. The stockyard company requires each respondent market agency to which livestock is shipped to furnish a bond covering the payment of freight, yardage, feed, and any other charges. These charges are deducted from the gross proceeds of sale of livestock before remittances are made to the shippers. The bills for these items are presented to respondents through the clearing house.

76. Each respondent furnishes a bond conditioned upon the faithful and prompt remittance of the proceeds of sale of livestock and the prompt execution of orders and the payment for livestock bought

on order. Such a bond is required by the rules of the Kansas City Live Stock Exchange of its members, and such a bond is required of all market agencies under the provisions of the Packers and Stockyards Act and the regulations promulgated thereunder.

61 VIII. Personal Service Character of Respondents' Business

77. The livestock commission business is essentially of a personal service character. The amount of capital necessary to conduct it is relatively small. The use of certain material equipment, however, such as office furniture and fixtures, and equipment of more or less elaborate character, automobiles and horses, is essential in the rendition of the service. The automobiles are used for trips to the country both to solicit shipments and to appraise livestock. They also are used for travel to near-by feedyards whereat livestock may be under the control of respective respondent firms while it is being fed and also whereat respondents sometimes consummate sales of livestock. In some instances the automobiles are owned by the respondent firm which uses them. In others they belong to a member or employee of the firm and their use is compensated for on some prearranged basis, such as actual expense or mileage. The horses are used in the cattle yards and are ridden by the cattle salesmen in the course of their handling and selling of cattle. In some instances they also are ridden by patrons who either have cattle consigned to respondents for sale or else are seeking to purchase cattle from respondents. In some instances these horses are owned by the respective respondent firms who use them. In others they are the property of the individual salesmen who may be owners or employees of a respondent firm. In still other instances they belong to the stockyard company and are rented, as occasion requires, at an agreed rental usually on a time basis.

78. In addition to the more or less permanently invested capital enumerated above, a certain amount of cash working capital is required. The business is essentially a cash one. That is to say, it comprises the receipt and remittance of the proceeds of sale of property owned by its patrons. Nevertheless, only those sales of livestock which are billed to the purchaser prior to 2 o'clock p. m. on the day of sale are paid for on that day. Respondents follow the practice of remitting the proceeds on the day of sale. Such remittances are made by deposits in banks at Kansas City for transmission to the banks of respondents' patrons. This form of remittance is desirable because it eliminates the so-called "float." It requires, however, that each respondent firm have on hand or available through bank credits, a sufficient amount of working capital daily to cover the difference between the total proceeds of sales made each day and the total collections realized on that day. A greater need for cash working capital arises from respondents' activities in the purchases of livestock for their customers. The custom of the mar-

ket place is such that this livestock must be paid for not later than 10 o'clock a. m. of the day following its purchase. The patron, who usually is a feeder, rarely comes to the market in position to make cash payment. This is partly at least because he does not know in advance exactly what the monetary requirements are to be and because in many instances he cannot arrange credit with his local bank until after the arrival of the livestock at his railroad station or farm. It appears impracticable to avoid extension of credit to these patrons. The livestock so purchased is paid for by the respondent firm and a draft is drawn on the patron through regular banking channels. Such drafts ordinarily are paid within from two days to two weeks, but infrequently may require more time.

79. The revenue of respondents' business consists of commissions charged by them for the sale and purchase of livestock. By far the greater portion of it comes from sales. The revenue from sales is deducted from the gross proceeds of such sales and therefore is received daily. This practically does away with any necessity for accounts receivable except in those infrequent instances in which a respondent firm advances money to a patron in contemplation of the sale of livestock, either already received at or on its way to the market. In the buying of livestock the receipt of commissions customarily is delayed from two days to two weeks. Some of respondents' cash requiring expenses are paid in advance, necessitating a small amount of working capital for that purpose. There is a further need for working capital to tide over those seasons when the low run of livestock may not produce enough income to maintain the overhead expenses of the business. It is not altogether practicable for a commission firm to expand and contract its organization to meet the fluctuation in receipts of livestock. Additional yard help may be hired during the heavy seasons but there are certain employees, such as salesmen, who must by the nature of the business be retained throughout the year.

63 80. The stockyard company required of those engaging in business on the market a bond covering, among other things, the payment of the freight, feed, and yardage charges. In addition to the formal requirements of registration and the filing of a tariff, the Packers and Stockyards Act, 1921, as amended, requires each market agency to give a bond covering the faithful and prompt remittance of proceeds of sale of livestock, and the prompt and faithful execution of orders for the purchase thereof and the payment for such purchases. The maintenance of these bonds necessitates a small amount of capital.

81. By far the greater part of the service rendered by respondents to their patrons comes not from the employment of property or money but the application by respondents and their more responsible employees of a personal skill, judgment, and integrity. Such skill and, to a considerable extent, judgment result from the training and experience required by respondents and their more responsible em-

ployees in the course of that development whereby one who enters the business in youth as a yardboy or minor office employee grows into a salesman, proprietor, or supervising office employee. While general scholastic training is not unusual among respondents, the character of the business is such that one may become better fitted for the higher positions by entering the low positions requiring little, if any, previous experience, and learning the business while working up to the better places. The personnel of the business may be divided into those whose major work is performed among the livestock in the pens and alleys and those whose time principally is spent in the offices. The first of these usually enter the business as young men with a background of livestock experience on farms. Nearly always they begin as yardmen for the commission men, however, in some instances as yardmen or other employees of the stockyard company. As yardmen they work side by side with and as assistants of the salesmen. Through this association they acquire the skill requisite to beginning as salesmen. While still yardmen they are permitted, from time to time, to sell livestock under the supervision of the salesmen, and later to sell small consignments of less important grades and classes on their own responsibility. This leads them to the position of salesmen when a vacancy occurs in the sales force.

64 The salesmen come in personal contact with the patrons and acquire a personal following which may become sufficiently large to enable them to acquire a membership in the firm by which they are employed, or to establish a new firm of their own.

82. The method of advancement to the higher office positions is not dissimilar from that which has been described with respect to the employees who work in the yard. In neither instance, however, have the more responsible employees and proprietors always worked up in the particular firm with which they are presently associated. In some instances, of course, the requisite experience has been gained while associated with other commission firms at Kansas City or at other livestock markets or while employed by a stockyard company or engaged in some activity related to the marketing of livestock at public stockyards. However, the rule is that the personnel holding the more responsible positions have gained their knowledge as an incident of employment in lesser positions at salaries compensatory of the services performed in those positions.

IX. Rates Charged by Respondents for Services Rendered

83. Respondents who were members of the Kansas City Live Stock Exchange filed to become effective on January 1, 1926, their tariff No. 2, setting forth all rates and charges for selling and purchasing livestock on the Kansas City market. Each of such respondents filed its separate supplement No. 3 to Tariff No. 2, effective January 1, 1930. This supplement contained rates and charges assessed by each respondent filing said supplement to cover the charges

made for insurance on livestock in the yards. With this supplement there was filed Tariff No. 2 as modified by Supplement No. 2 thereto. Certain of the respondents, pursuant to provisions of Tariff No. 2, as amended by Supplement No. 2, filed their individual tariffs covering their rates and charges for purchasing livestock. On May 11, 1932, and prior to the issuance of the Acting Secretary's order of May 18, 1932, all respondent commission firms (i. e., those who sell livestock on a commission basis), and all the respondent order buyers except three filed severally a uniform tariff of rates and charges for selling and buying livestock to become effective on May 23, 1932. The two respondent cooperative commission firms filed schedules, effective on June 18, 1932, in conformity with the order of May 18, 1932. These two cooperative agencies later filed schedules, effective on October 10, 1932, modifying somewhat their commission charges.

84. A summary of the tariffs of respondents, other than the cooperative market agencies, now in effect at the Kansas City market follows:

SELLING CHARGES

Cattle and Calves Arriving by Rail:

Calves:

1 to 20 head, average weight 400 lbs. or under	30¢ per head
All over 20 head	25¢ " "

Yearlings and Cattle:

1 to 20 head, average weight 400 to 800 lbs.	60¢ " "
All over 20 head	40¢ " "

Cattle:

1 to 20 head, average weight 800 lbs. and over	70¢ " "
All over 20 head	60¢ " "

Cattle and Calves Arriving by Truck:

Calves:

2 to 20 head, averaging 400 lbs. or under	30¢ per head
All over 20 head	25¢ " "

Yearlings and Cattle:

2 to 20 head, averaging 400 to 800 lbs.	65¢ " "
All over 20 head	45¢ " "

Cattle:

2 to 20 head, averaging over 800 lbs.	70¢ " "
All over 20 head	60¢ " "

Minimum Charge for One Head.

Calves—40¢.

Cattle—80¢.

Hogs:

1 to 40 head, averaging over 130 lbs.	25¢ per head
All over 40 head	10¢ " "
1 to 50 head, averaging less than 130 lbs.	20¢ " "
All over 50 head	5¢ " "

Minimum Charge for One Head.

Sheep or Goats Arriving by Rail:

For the first 120 head in each ear	10¢ per head
Additional head over 120 to 160 head	5¢ " "
Each additional head over 160 head	4¢ " "

Sheep and Goats Arriving by Truck:

For each 300 head or part thereof:

1 to 10 head	25¢ per head
11 to 40 " "	20¢ " "
41 to 60 " "	15¢ " "
61 to 300 " "	4¢ " "

Minimum Charge for One Head—35¢.

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BUYING CHARGES

Cattle and Calves Shipped out by Rail:

Cattle and Calves, 50¢ per head; minimum \$12 a car; maximum \$15.

Calves, 30¢ per head, with a maximum of \$15 per car.

Cattle Trucked Out:

50¢ per head; maximum \$15 for 22,000 lbs.

Cattle Shipped out for Slaughter, \$15 a car.

Cattle trucked out for Slaughter, 50¢ a head, maximum \$15 for 22,000 lbs.

Hogs:

Feeders and Stock Pigs:

Up to 50 head, 20¢ per head.

51 head and above, 5¢ per head.

Slaughter Hogs:

Up to 50 head, 20¢ per head.

51 head and above, 5¢ per head.

Sheep or Goats Shipped out by Rail:

\$12 single deck; \$16 double deck.

Sheep or Goats Driven or Hauled out:

Up to 125 head, 20¢ per head; maximum \$12.

Above 125 head, 15¢ per head additional; maximum \$16 up to 250 head.

A summary of the tariffs of the respondent cooperative market agencies now in effect at the Kansas City market follows:

SELLING COMMISSIONS

Straight cars	Head	Minimum		Maximum	
		S. D.	D. D.	S. D.	D. D.
Cattle.....	\$0.60	\$13.00		\$15.50	
Calves.....	.30	13.00		15.50	\$18.50
Hogs.....	1.20			12.00	16.00
Sheep.....	1.10			12.00	17.00
	.15	10.00			

¹ Up to 40 head.² Each additional head over 40.

67. Mixed Cars:

Cattle—65¢ per head. Not to exceed \$15.50 for the cattle in a car.

Calves—32¢ per head. Not to exceed \$15.50 for the calves in a single deck or \$18.50 for the calves in a double deck car.

Hogs—25¢ per head up to 40 head. 10¢ per each additional head over 40; not to exceed \$12 for the hogs in a single deck car, or \$16 for the hogs in a double deck car.

Sheep—15¢ per head. Not to exceed \$12 for the sheep in a single deck or \$17 for the sheep in a double deck.

Drive-Ins:

Cattle—65¢ per head with a maximum of \$16.50 up to and including each 27 head.

Calves—On each 75 head of calves or fraction thereof in one consignment belonging to one owner the rates shall be determined as follows: 30¢ per head with a maximum charge of \$16.50 up to and including 55 head; 25¢ per additional head above 55 with a maximum charge of \$17.50 up to and including 75 head.

Hogs—25¢ per head up to 40 head, inclusive; 10¢ per each additional head with a maximum charge of \$14 on any one consignment.

Sheep—On each 250 head of sheep or fraction thereof in one consignment belonging to one owner the rate shall be determined as follows: 20¢ per head with a maximum of \$13.00 up to and including 125 head. 15¢ per additional head above 125 with a maximum charge of \$18.00 up to and including each 250 head.

BUYING COMMISSIONS**Cattle or Calves:****Non-Slaughter:**

(a) Shipped out—50¢ per head with a minimum of \$12 and a maximum of \$15 per car.

(b) Trucked or driven out—60¢ per head with a maximum of \$16 and 22,000 pounds shall be considered as the maximum weight to be purchased at this maximum rate.

Slaughter:

(c) Shipped out—maximum \$15 per car.

(d) Trucked or driven out—60¢ per head.

Hogs:

(e) Slaughter—\$7.50 for single deck car; \$12 for double deck car.

68 (f) Stock—\$12 for single deck car; \$20 for double deck car:

Driven or Hauled out:

25¢ per head up to 48 head.

On larger lots carload rates; 120 head to be considered a single deck load.

Sheep or Lambs:

(g) Sheep or lambs \$12 per single-deck and \$16 per double-deck car.

(h) Sheep or lambs driven or hauled out, 20¢ per head or a maximum of \$12 up to and including 125 head. 15¢ per additional head above 125 with a maximum charge of \$16 up to and including 250 head.

The foregoing are the basic rates but do not include all charges made. There are, in addition, provisions in respondents' tariffs for certain extra service charges, minimum charges on consignments, and special charges for selling the livestock of dealers. Besides these there are other miscellaneous provisions with respect to the application of the rates.

X. Volume of Business Handled by the Respondents

85. The revenue producing business of the respondents consists of livestock sold and livestock purchased on a commission basis in the Kansas City Stockyard and to a comparatively slight degree at points away from Kansas City. The volume discussed under this heading relates to that portion of the business of the respondents transacted at the Kansas City market. Most of the respondents who sell livestock also purchase it on order and charge a commission therefor. Such purchasing is the principal business of certain respondents known as order buyers.

86. While in this order the unit principally used for rate making purposes is the head of each respective species of livestock, simplicity and clarity in the statement of relative revenue producing volumes of the respective respondents require the use of some common denominator. This is for the reason that the commissions for the sale or purchase of a single head of cattle necessarily exceed to a considerable degree such commissions with respect to a hog or a sheep. The fact that a carload of hogs or sheep contains many more animals than
69 a carload of cattle brings the commission revenue produced from it much more nearly on a level with that produced from a carload of cattle. Therefore, in this discussion of the revenue producing volume, the livestock of each species handled by each respective respondent commission firm is reduced to carload equivalents based upon the average number of animals per car of the particular species contained in the total number of straight cars of that species received

by the particular respondent during the years 1929 and 1931. The following table sets forth the number of cars of livestock of all species received by each of the respondents:

VOLUME HANDLED BY COMMISSION MEN IN 1929

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
33.....	114	8.....	851	34.....	1,894
49.....	131	23.....	871	28.....	1,930
37.....	162	5.....	879	14.....	2,124
72.....	165	39.....	950	25.....	2,147
66.....	178	60.....	1,000	42.....	2,288
80.....	277	77.....	1,022	18.....	2,381
86.....	365	44.....	1,039	12.....	2,958
85.....	421	16.....	1,204	83.....	2,980
78.....	449	75.....	1,208	71.....	3,117
79.....	449	29.....	1,285	13.....	3,343
11.....	456	4.....	1,302	84.....	3,641
43.....	492	62.....	1,306	51.....	3,786
74.....	499	48.....	1,367	73.....	4,051
31.....	512	7.....	1,382	35.....	4,394
67.....	555	70.....	1,400	10.....	4,913
1.....	590	55.....	1,441	30.....	4,995
61.....	611	52.....	1,463	82.....	5,415
76.....	612	33.....	1,583	46.....	7,552
6.....	642	65.....	1,625	54.....	8,158
17.....	699	26.....	1,739	63.....	8,577
20.....	805	56.....	1,775	59.....	8,778
15.....	829	08.....	1,838		

Of these 65 firms listed above, 11 firms handled over 50 percent and 25 firms handled over 75 percent of business received by all.

VOLUME HANDLED BY ORDER BUYERS IN 1929

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
49.....	11	69.....	233	32.....	1369
47.....	34	39.....	446	51.....	1978
24.....	75	3.....	450	64.....	2771
48.....	79	38.....	917	57.....	3309
40.....	102	21.....	1121		

VOLUME HANDLED BY COMMISSION MEN IN 1931

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
37.....	67	52.....	820	34.....	1984
23.....	72	5.....	857	25.....	1999
72.....	88	75.....	872	42.....	2022
67.....	91	60.....	905	18.....	2092
88.....	99	77.....	906	55.....	2219
11.....	106	29.....	962	71.....	2234
66.....	112	16.....	988	35.....	2418
1.....	257	20.....	1039	12.....	2450
74.....	314	7.....	1067	13.....	2475
9.....	364	26.....	1161	73.....	2936
79.....	381	23.....	1239	51.....	2976
78.....	421	4.....	1241	84.....	3021
76.....	424	44.....	1261	82.....	3741
61.....	425	56.....	1263	83.....	4130
87.....	432	62.....	1292	26.....	4996
17.....	446	33.....	1297	46.....	5041
19.....	447	65.....	1372	10.....	5699
6.....	605	70.....	1382	63.....	6009
15.....	702	48.....	1421	59.....	7022
43.....	785	11.....	1641	54.....	8544
30.....	811				

Of the 61 firms listed above, 11 firms handled over 50 percent and 23 firms handled over 75 percent of the business received by all.

Firm No.	No. of cars	Firm No.	No. of cars	Firm No.	No. of cars
101.....	3,417	104.....	290	106.....	812
102.....	2,103	105.....	99	107.....	570
103.....	892				

XI. Gross Revenues

87. The respondent commission firms vary among themselves in the amount of gross revenues received from the sale of livestock consigned to them. These differences are due, for the most part, to variation in the volume of livestock received by them. Some of them, however, are attributable to a lack of uniformity in the character of business received. The livestock consigned to some firms may run heavily to one species and grade and that of another to another species and grade.

88. The following tables show for each firm the gross selling and buying commissions received from Tariff No. 2 in 1929 and in 1931

COMMISSION MEN

Firm No.	Amount	Firm No.	Amount
1929		1931	
33.....	\$1,943.32	37.....	\$1,199.90
41.....	2,228.05	43.....	1,522.00
72.....	3,021.40	72.....	1,695.00
37.....	3,115.05	85.....	1,832.00
66.....	3,326.40	11.....	1,845.00
80.....	4,658.92	66.....	1,983.00
86.....	6,386.20	67.....	2,467.00
85.....	7,073.30	1.....	3,600.00
11.....	7,224.28	9.....	5,687.00
79.....	8,224.73	74.....	5,923.00
78.....	8,363.23	79.....	7,446.00
74.....	8,523.07	73.....	7,563.00
67.....	9,347.92	61.....	7,718.00
31.....	9,697.15	76.....	8,097.00
61.....	10,187.30	19.....	8,185.00
1.....	10,317.35	17.....	8,421.00
76.....	10,908.58	87.....	8,883.00
43.....	11,246.92	6.....	11,688.00
6.....	11,564.97	52.....	14,781.00
17.....	12,195.40	15.....	14,911.00
23.....	14,903.85	30.....	15,428.00
72.....	15,271.95	77.....	15,927.00
8.....	15,603.20	75.....	16,274.00
15.....	17,024.20	60.....	17,078.00
5.....	17,310.69	43.....	17,419.00
77.....	17,657.03	5.....	17,556.00
30.....	17,971.15	29.....	18,286.00
60.....	19,297.77	16.....	18,837.00
75.....	20,710.51	20.....	19,581.00
16.....	22,431.33	7.....	20,073.00
62.....	23,139.40	23.....	20,792.00
4.....	23,171.64	25.....	21,897.00
29.....	23,804.71	4.....	22,336.00
44.....	25,014.27	56.....	23,193.00
48.....	25,910.35	62.....	23,488.00
53.....	26,038.80	53.....	23,881.00
7.....	26,481.24	65.....	25,613.00
58.....	26,770.90	70.....	26,391.00
70.....	27,154.97	48.....	27,216.00
53.....	28,775.67	44.....	27,679.00
56.....	30,627.84	34.....	29,041.00
65.....	31,275.50	14.....	32,208.00
26.....	31,517.40	25.....	34,280.00
68.....	31,603.26	18.....	37,283.00
34.....	31,992.53	42.....	39,296.00

COMMISSION MEN—Continued.

Firm No.	Amount	* Firm No.	Amount
1929		1931	
2.	\$34,325.90	55.	\$40,949.18
14.	37,534.95	71.	41,474.09
25.	38,382.32	35.	45,007.41
16.	42,551.14	12.	45,066.81
6.	43,228.85	13.	47,563.60
53.	50,133.21	73.	51,233.80
12.	52,653.11	84.	52,999.55
71.	53,301.19	51.	54,703.22
11.	61,483.65	82.	67,812.70
84.	61,984.59	83.	68,677.00
51.	65,065.77	46.	91,216.54
73.	72,448.32	36.	99,769.35
35.	78,574.95	10.	102,078.98
20.	80,759.27	65.	104,993.75
82.	94,998.17	59.	120,036.08
36.	118,172.84	54.	154,137.19
46.	124,217.91		
60.	148,516.86		
54.	148,609.21		
59.	155,361.93		
	\$2,313,442.99		\$1,911,837.81

73 Of the 65 firms listed for 1929, 11 firms received over 50 per cent of the 1929 revenues; 26 firms received over 75 per cent of these revenues. Of the 61 firms listed for the year 1931, 11 firms received over 50 per cent of the revenues for that year; 24 firms received over 75 percent of the revenues of that year.

XII. Methods Used by Respondents in Getting and Maintaining Business

89. The respondents employ many different methods in their attempts to get and maintain volume of business. They vary somewhat in their opinions as to the relative value of the different business getting and maintaining activities. They are practically unanimous, however, in the view that the most important factor is the rendering of the highest class of service. It is their opinion that a satisfied customer is a firm's best advertisement. Most of the respondent firms send out market letters periodically. These vary in frequency, size and content. They usually contain information about general market conditions and prospects for the future and give an account of some outstanding sale made by the issuing firm. Frequently matters of general interest to live stock producers are incorporated in these market letters. In addition to these, some of the firms get out circulars or cards giving suggestions about sorting and grading and methods of feeding and loading livestock. Those respondents who are members of the Live Stock Exchange are prohibited by its rules from giving presents or gifts in consideration of past or future business. This rule does not preclude the giving of articles, such as lead pencils, memorandum books, and other inexpensive advertising novelties.

90. Some of the respondents advertise in livestock journals and in the local papers in the territory from which they are accustomed to

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receive livestock. A local livestock market paper is published at the Kansas City market. Prior to January 1, 1930, it was the custom of many of the respondents to give free subscriptions to this paper to some of their customers. On January 1, 1930, the respondents who were members of the Exchange discontinued this custom under a rule of the Exchange which became effective on a sliding scale basis within a period of six months. In lieu of this practice, the

74 Exchange began a radio broadcast service for the maintenance of which each member is charged .5¢ per car on the livestock handled. This radio broadcast is in the nature of a joint advertising venture on behalf of Exchange members.

91. Livestock salesmen carry on a considerable volume of correspondence with their customers and thus maintain contacts regarded as so necessary in the commission business. Most of the firms keep a list of customers and prospective customers. In addition to answering inquiries made by customers for market information, some of the firms at such times as they may deem suitable send letters dealing with market conditions which they consider of interest to their customers.

92. Respondents frequently entertain their customers, but a rule of the Exchange prohibits the giving of free meals in the West Bottoms, which is that part of the central industrial district of Kansas City in which the stockyard is located. Outside of this restriction, the amount expended for entertainment is limited only by what each firm may deem expedient in its own case. Throughout the course of the year there are meetings and conventions of producers held in the trade territory of the Kansas City market. It has become customary for many of the respondents to send representatives to these meetings. Attendance thereon affords an opportunity to meet and talk with the producers of livestock. In addition, respondents make special trips to the country for the purpose of soliciting business. Those respondents who are members of the Exchange are prohibited by its rules from employing traveling or livestock solicitors. Only individual bona fide stockholders of corporations and salesmen or buyers of livestock on the Kansas City market, regularly employed in the commission business at Kansas City, may solicit business for the market. Such persons cannot remain in the country on a soliciting trip more than 15 days in each month, subject, however, to certain exceptions in certain stated regions.

93. In an effort to get business many of the respondents have undertaken the rendition of definite services incident to the marketing of livestock, but not immediately associated with the service of buying and selling livestock on a commission basis at the Kansas City market. One of these activities is commonly referred to as 75 "appraisal" or "inspection" work. Some of the shippers, those usually having more than a carload of livestock to be marketed, request members of respondent firms, or their salesmen, to come to the country and look at their livestock. The object of the shipper in requesting this service is to get the opinion of the salesman

as to whether the livestock is in condition to be marketed to best advantage and about what price it may be expected to bring. Frequently on such visits the salesman assists the producer in sorting his livestock and in loading it for shipment. A single shipper sometimes requests this service of more than one commission firm in order to get the benefit of the opinions of more than one salesman. These appraisal or inspection trips are made either by train or by automobile. In near-by territory it is usually done by automobile. These trips are made at the expense of the respondent firms. Inasmuch as this is a free service and respondent firms encourage shippers to avail themselves of it, it is increasing.

94. Several sheep and cattle feeding yards are located near Kansas City to which some shippers send their cattle and sheep to be held and fed anticipatory to marketing it either at such feed yards or at the Kansas City stockyard or some other livestock market. It is customary for the owners of such livestock to ask the commission firms to look after it. The owners often accompany it. Respondents make trips, sometimes with the owners, to these feeding yards to look over the livestock and render sundry services in connection with it, such as sorting, supervising, and feeding it and arranging for shearing of sheep and the selling of the wool, if shearing is deemed necessary. No separate charge is made for these services. At the time of the second hearing in this case cattle and sheep were being bought and sold at some of these neighboring feeding yards.

95. The leasing of pasture land for the use of those customers who have cattle to graze has become an important activity for some of the respondent firms. The Kansas City market is near the Flint Hill section of Kansas and the Osage country of Oklahoma, which are extensive grazing areas. Many stockmen throughout the Southwest request their commission firms at the Kansas City market to obtain pasture for them in these grazing regions. The re-

76 spondent firms that render this service make it a point to keep informed in regard to the available pastures, in order that ready contact may be made with the owners of these grazing lands. A commission firm rendering this service goes out to inspect the pastures in order to determine the condition of the grass, the water supply and the character of the fences, and then reports to the customer. The commission firm also furnishes a form of pasturage contract, which is used when the owner leases the land. After the lease has been made and the owner has shipped this livestock to the pastures, a representative of the commission firm is usually present when the cattle arrive in order to look after the interests of the owner. While the cattle are grazing frequent trips are made by the interested commission firm for the purpose of inspecting the cattle, the condition of the grass, and the supply of water. Another inspection of the cattle generally is made before shipment to market. No separate charge is made for this service which is rendered in the hope that the commission firm rendering it will receive the livestock for sale on the Kansas City market. It sometimes happens that this

livestock is shipped elsewhere or, if to the Kansas City market, to some other firm than the one which has rendered the service.

96. Some of the respondent firms engage in making loans on livestock. Such firms either loan their own money or negotiate loans through a bank. They may act as the endorser of livestock paper. In those cases in which they endorse the paper, the interest charged is about one per cent above that which prevails in the market. This represents a charge by the commission firm for its services and for underwriting the risk involved. In connection with making loans on livestock it is usually necessary to make an inspection of it. Most of the loans are made at the time the livestock is purchased at the market. In this event the work of inspection does not involve a great deal of time or expense since the details are handled by the regular office force. The respondents do not contend that the livestock loan business is a part of the commission business, but they do contend that it is a business-getting venture and that the expense incurred in connection with it is one properly incurred in the conduct of the commission business.

97. The business-getting efforts of those who buy livestock on order are not so varied. They advertise in papers to some extent and make occasional trips to call upon their customers. Contact by telephone and telegraph is the principal means used by them in getting and maintaining their volume of business.

XIII. Joint Activities of the Respondents

98. With the exception of the two cooperative commission firms and several individual order buyers operating on a small scale, respondent firms maintain the Kansas City Livestock Exchange, which is a voluntary organization not conducted for profit. The object of this association is to maintain uniform customs and certain standards of trade ethics, more particularly outlined in the rules formulated by it. All members of the Exchange are required to observe these uniform rules. The membership of the Exchange is composed of those who engage in the commission business at the market and such others as were once engaged in such business and who have become inactive but have retained their memberships.

99. There exists also an arrangement between the members of the Exchange and the respondent cooperative firms known as a trade practice agreement, whereby the latter two firms, by meeting certain conditions, such as the giving of bonds and agreeing to abide by certain disciplinary measures, can avail themselves of certain facilities maintained by the Exchange. The Exchange is registered as a market agency engaged in rendering certain miscellaneous services, including particularly hog inspection and dockage. It is not a respondent in this proceeding and the reasonableness of its rates for services is not a subject of inquiry here.

100. The Exchange maintains a system of hog inspection and dockage whereby it employs men to inspect these animals for conditions of

health and for certain physical conditions which may exist in some hogs, for which a deduction from the agreed price will be made. The rules of the Exchange definitely prescribe the procedure. If there is dissatisfaction with the dockers' decision, an appeal may be taken to the chief inspector whose decision is final unless an arbitration is called for. The person who calls the arbitration is charged \$1.50. A charge of 20¢ is made on each car of hogs arriving at the market for sale, and a prorata charge is made on truck receipts of 78 hogs to cover the expenses of hog inspection and dockage. This charge is deducted from the proceeds of sale of hogs.

101. The Exchange maintains a clearing house which serves as a central office for the convenient handling of bills rendered and accounts collected. Each firm pays for the use of this facility according to the volume of business handled. The cooperative firms also avail themselves of this service.

102. The Exchange procures and maintains a policy of insurance, protecting livestock against fire while it is in the yard. One-half the premium is deducted from the proceeds of sale of livestock. Traders, packers, and order buyers also make a contribution to a fund used to maintain this insurance. Those agencies which are not members of the Exchange maintain their individual insurance policies and do not enjoy the protection of the blanket policy carried by the Exchange for its members. The collections by the Exchange exceed the premiums, and this excess goes into the general fund.

103. The Exchange has an agricultural development fund. Members are assessed 10¢ per car on inbound shipments, 6¢ per car on livestock bought on order, and 6¢ per car on livestock cleared through brokers. This fund is used in general promotional work, such as livestock sanitation, boys' and girls' club work, and fairs.

104. On March 1, 1930, the Exchange began making an assessment of 5¢ on each inbound car of livestock sold, to support the radio broadcasting conducted by it. This charge is made against those firms which are members of the Exchange. The Exchange also assesses each firm 2¢ per car on all inbound rail receipts to maintain its transportation department. The purpose of this department is to look after train service and the relationship of freight rates as between Kansas City and other markets. The respondent cooperative firms are assessed for this purpose, pursuant to the trade practice agreement.

105. The Exchange charges \$3 per month per membership for the purpose of building up a fund to retire the certificates of membership of deceased members. This is governed by the rules of the

79 Exchange. The Exchange has organized an independent association, composed of members of the Exchange, known as the Kansas City Live Stock Exchange Employees Association.

It has the same officers as the Exchange and is founded and operated under the insurance laws of New York. Contributions to this are made on an individual basis, and the expenses of the association are borne by assessments against individual members.

XIV. Risks Incurred in the Commission Business

106. The record in this proceeding shows the character of the risks to which the respondents are subject in the conduct of their business. These risks are of two general types, namely, those which result in losses of sufficient frequency and definiteness to make it possible for insurance companies to calculate on an actuarial basis the premiums necessary to be charged and those which occur so infrequently and are so indefinite in character as to make this impossible. The former class of risks is insurable, while the latter is not. Insurance premiums paid enter into the expenses of the respondents. The losses incurred on account of uninsurable risks constitute items to be provided for in the reasonable profit allowable over and above reasonable expenses. The respondents claim that these risks affect both their revenues and their expenses. Among those which affect their revenues are the possibility of decline in the production of livestock within the trade territory of Kansas City and the growth of direct buying by packers in that area. Among those risks affecting unfavorably the expenses of conducting their business the respondents enumerated the following: their guaranty against defects in title to livestock sold by them; errors entering into accounting processes; failure of producers to make payment; losses through litigation on account of bank failures; freight undercharges; sales of diseased and defective livestock; loss or damage to livestock while in their custody; public liability; liability to employees; and loss of property through fire. Against insurable hazards most of the respondents carry some insurance but there are others who choose to carry this risk themselves.

107. The respondents are forced by the conditions which surround the conduct of their businesses to carry some of the risks themselves.

80 While the livestock commission business is theoretically a cash business, it frequently happens that respondents make remittances before they have received payment for livestock sold. If the buyer is a regularly registered agency at the market, other than a packer buyer, the payment for the livestock is guaranteed under the buyer's bond. If, however, the buyer is not bonded, there is an element of risk in a sale to such a person in that the purchaser for some reason may not settle for the livestock purchased. It sometimes happens in connection with sales of livestock to a countryman who gives his check or in case of a sale to those who purchase on order that the commission man turns over to the owner the proceeds of sale before collection is made from the purchaser. Besides this, there is also an element of risk involved in the remittance of proceeds to the shipper in that litigation may arise in connection with the failure of a bank in which proceeds have been deposited. Other risks which may be classed as uninsurable are those arising from bad debts, errors, and adjustments which cannot be avoided even by reasonable precaution, losses on account of making loans, and other items of like character. Bad debts are usually incurred in connec-

tion with loans made or credit given to those for whom purchases are made, or the honoring of drafts drawn by shippers before livestock has been sold, the proceeds of the sale of which do not equal the amount of the draft. There is also the possibility of injury to livestock while in the custody of the commission firms resulting from the negligence of the commission firm or its employees. Inasmuch, however, as each commission firm endeavors to render the highest class of service and handle livestock in the most humane manner, the risk of loss from this source is practically negligible.

XV. Economic Changes Since the Year 1929

108. The re-hearing was granted in this proceeding upon the ground alleged by the majority of the respondents in their petitions therefor, namely, that changed economic conditions since the original test year, 1929, had rendered the experiences of that year insufficient as a basis for the determination of reasonable rates. It becomes pertinent, therefore, to note herein the changes shown of record and noticeable under the doctrine of Atchison, Topeka, and Santa Fe Railway Company v. U. S., 284 U. S. 248, which have occurred between the year 1929 and the close of the record in 81 the last yearing in this proceeding. They may be discussed as three general classes, namely (1) general changes affecting the country as a whole; (2) general changes affecting the livestock industry; and (3) particular changes affecting respondents' businesses and revenues.

109. The general economic changes are, in brief, that beginning in the year 1929 the business life of the country has descended from one of the highest levels of activity and prosperity ever known to one of the most severe depressions in our entire national experience. Values of tangible property and of investments, as well as incomes, salaries, wages, and commodity prices have descended to levels lower than were thought in 1929 hardly to be possible.

110. The effect of the general depression was felt severely in the livestock producing industry. Whereas in December 1929, the monthly average prices at Kansas City of slaughter steers ranged from \$9 to \$14 per 100 lbs.; of hogs from \$7 to \$9; and of slaughter lambs from \$9 to \$12; depending upon weight and grade, the comparable prices for December 1931 were: slaughter steers, \$3 to \$10; hogs, \$3 to \$4; and slaughter lambs, \$3 to \$5. It was testified by some of the respondents that at times since the year 1929 the livestock market at Kansas City was so demoralized by lack of demand and consequent low prices that they advised their patrons to withhold shipments of livestock even though so doing tended to decrease the respondents' own revenues.

111. In its effect on the prosperity of the respondents' businesses the general depression manifested itself principally in a decline in the volumes of livestock received by them for sale or bought by

them on commission. As illustrative of this, their total revenue producing fresh receipts of livestock were for 1929: cattle 1,743,165; calves 273,577; hogs 2,140,170; and sheep 1,673,705 head; while for 1931 they were: cattle 1,580,290; calves 236,727; hogs 1,102,425; and sheep 1,817,611 head. There were, of course, corresponding declines in revenues, except in the case of sheep where the increased volume produced a greater revenue. The record having been closed in November 1932, receipts for the entire period of that year are not available. However, those for the first seven months thereof were not quite as great as during the similar period of 1931.

112. In the year 1932, partly, at least, as a result of the general depression and the unfavorable economic condition of their patrons' businesses, respondents reduced their rates to some extent.

113. Notwithstanding the unfavorable business conditions and lowered receipts in 1931, as compared with 1929, few of respondent firms operating in both of those years showed any substantial reduction of personnel in the former as compared with the latter. Also, few firms made any substantial reduction in salaries and wages sufficiently early in the year 1931 materially to affect their cost of doing business as shown in the audits covering that year. Such decreases as were made took place largely in the latter part of the year 1931 and in the year 1932. The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929. This necessarily has a depressing effect upon the net moneys available to the owners of these businesses which may be designated "net owner incomes."

XVI. Principles Governing Determination of Reasonable Commission Rates

114. The Packers and Stockyards Act provides that if, after investigation, the Secretary of Agriculture finds commission rates in effect at a livestock market to be unjust, unreasonable, or discriminatory, he shall prescribe rates that are just, reasonable and non-discriminatory, or the maximum or minimum rates, or the maximum and minimum rates, which are just, reasonable and non-discriminatory. In arriving at such a schedule it is necessary to adopt a guide to reasonableness. The guide adopted in this case is that under ordinary conditions as they prevail on the Kansas City market, a schedule of rates should be high enough to produce sufficient gross revenues to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to the owner or owners of any firm which receives enough livestock to enable it—handle its business in a reasonably efficient and economic manner. This principle was followed in the Omaha Commission Rate Case, and was approved by the Supreme Court of the United States in the case of

Tagg Bros. and Moorhead, et al., vs. United States (280 U. S. 420).
 83. It becomes necessary, therefore, in following this guide to determine the reasonable costs to the respondents of handling each species of livestock.

XVII: Cost Occasioning Factors.

115. There is a relationship between those factors which occasion work for respondents and their employees and the costs to respondents of rendering the services for which they charge the rates. This relationship, however, is not so direct as to bring about an increase in cost whenever an increase in work arises. This is due to the fact that in many instances the major functions of those engaged in performing the activities of respondents can be carried on only at certain times. For instance, a salesman cannot sell livestock except when the market is open and more or less active, notwithstanding the volume of livestock which he has for sale. On the other hand, the type of men who make good salesmen would hardly be content to accept less salaries in consideration of short hours. They demand and get good pay and are willing to return therefor a reasonable days' and weeks' service. Therefore, the fact that, prior to the selling hours they assist in the yards and that, during the last one or two days of the week they go to the country to appraise livestock and solicit business do not increase the respondents' expenses for salaries. Therefore, in the distribution of costs hereinafter made to functional accounts, the services of a salesman, for instance, are not divided as between selling, yarding, office work and business getting and maintaining, but are considered as being covered by the reasonable allowance for salesmanship. The same is true in principle with respect to the salaries of other workers such as yardmen and those who are engaged in the office.

116: The cost occasioning factors will as a rule be found to consist of those activities which require the employment of a personnel in the handling of a given number of animals. For instance, since each consignment, however large or small it may be, must be yarded, sold, weighed and accounted for as a separate unit, the greater the number of consignments contained in each hundred thousand of animals handled by a respondent firm the greater will be the personnel and resultant cost required for such handling. To a less degree the same is true with respect to the number of drafts and of owners and of account sales to the hundred thousand of animals handled. The accompanying table, considered in conjunction with the unit cost per firm of handling the various species of livestock according to modes of arrival, is an illustration of these facts.

4 The accountants' analyses hereinafter described indicate that the greater unit costs attach to livestock coming in with species mixed in a car or in motor trucks or received as so-called "seconds" in the yard and the lesser unit costs attach to the livestock which

arrives in railroad cars without species being mixed. This table shows that in the case of cattle, for instance, those coming by straight rail, single ownership, average for the market as a whole 45 head per owner and 45 head per account sale, which is practically equivalent to per consignment, and 11 head per draft, whereas the mixed rail, single ownership, average only 33 head per owner and 30 head per account sale and approximately 2 head per draft; the drive-ins average 4 head per account sale and 4 head per owner and 2 head per draft; and the seconds average 8 head per account sale and 8 head per owner and less than 4 head per draft. The differences in unit costs hereinbefore discussed have occasioned classifications in rates based on the mode of arrival, but both the testimony of some of the respondents and the conclusions to be drawn from the analyses of the accountants lead to the further conclusion that costs do not depend upon the vehicle in which the livestock was transported to market or the company it kept on the road, but rather on the number of head contained in, the number of owners to, and the number of drafts necessary in each consignment. The table here discussed follows:

XVIII. Preparation for the Determination of Costs

117. In preparation for the determination of costs in this matter the Government caused to be made an audit of the business done by each respective respondent firm (including corporate and individual respondents) during the year 1929 and, when a re-hearing had been granted, caused to be made similar audits covering the year 1931. These audits were made by trained and experienced accountants, under the supervision of a chief accountant, from the books and records of the respondents. In each instance the year chosen was the last complete calendar year preceding the hearing. The marketing of livestock at Kansas City is such as to render the full calendar year the fairest accounting period. One, among other reasons for this, is that the calendar year presents a complete cycle of marketing of
85 the various classes and grades of livestock. The factors which may occasion light runs at one period of the year are apt to cause correspondingly heavy receipts at another.

118. While in preparation for each hearing it was only practicable to audit the business for one calendar year, much information concerning the conditions which affect respondents' businesses and covering a period of many years was obtained and placed in the record. Particularly among these was a showing of the volume of livestock received at the Kansas City stockyard year by year from 1882 to 1931, both inclusive, and month by month from January to September, both inclusive, of the year 1932.

119. In recognition of the fact that the rates prescribed will affect the respondent firms severally and not collectively, it is considered that the several experiences of more than 60 firms, occurring under conditions similar to those which may be expected to prevail when the

ates have gone into effect, is more pertinent than would be the experiences of one firm over a number of past years, the circumstances and conditions of many of which long ago have ceased to exist. The audits so prepared were accepted by the respondents as constituting true reflections of the facts disclosed by their books and records of account for the periods covered, though they contended that some items of cost incurred in their business were not shown on their books.

120. From those audits, the Government's chief accountant prepared for the year 1929 a functional cost analysis on a unit basis; that is to say, the audits and auxiliary data indicated the allocation directly to each species of livestock of a large percentage of the total cost incurred by each respondent firm. The remaining cost, which could not be allocated directly, was distributed by the accountant on what he considered appropriate bases.

121. He made a similar analysis covering the year 1931 and for that year also a further analysis, commonly called a "differential study," whereby he broke down the total cost per function and per species and distributed it over the various modes of arrival within each species for each particular firm, to the end that he might discover, for instance, how much it cost a particular firm to yard a hog arriving by motor truck as distinguished from the cost to the same firm for yarding a hog which came in by rail.

UNITED STATES VS. F. O. MORGAN

	Straight rail		Mixed—Cattle and calves		Mixed—All species		Drive-ins	Seconds	Buying		
	S. O.	P. O.	S. O.	P. O.	S. O.	P. O.			Rail	Drive-outs	
Cattle:	Cars	31, 231	6, 112	5, 954	3, 751	543	401	182, 764	105, 709	14, 275	24, 908
	Decks	31, 231	6, 112	5, 954	3, 751	543	401	182, 764	105, 709	14, 275	24, 908
	Head	867, 253	180, 598	197, 060	122, 531	17, 136	12, 958	89, 737	31, 789	49, 041	5, 953
	Drafts	72, 509	34, 309	45, 917	40, 661	5, 851	6, 527	45, 441	13, 624	10, 423	2, 365
	Owners	18, 865	10, 876	2, 630	8, 810	5, 506	2, 779	45, 441	13, 624	10, 423	2, 365
	Account Sales	18, 922	9, 950	2, 650	7, 284	509	2, 032	45, 441	13, 624	10, 423	2, 365
	Head per Draft	11, 96	5, 26	4, 29	3, 01	2, 93	1, 98	2, 04	3, 33	4, 18	10, 53
	Head per Owner	45, 97	16, 60	74, 93	13, 91	33, 36	4, 66	4, 02	7, 76	47, 11	10, 53
	Head per Account Sale	45, 81	18, 15	74, 37	16, 82	33, 67	6, 38	4, 02	7, 76	47, 11	10, 53
	Calves:										
Hogs:	Cars	244	23	1, 168	592	106	87	98, 911	14, 987	471	4, 319
	Decks	248	23	1, 168	592	106	87	98, 911	14, 987	471	4, 319
	Head	14, 035	1, 228	73, 170	36, 004	6, 885	5, 894	41, 010	1, 288	28, 726	3, 403
	Drafts	14, 035	1, 228	73, 170	36, 004	6, 885	5, 894	41, 010	1, 288	28, 726	3, 403
	Owners	751	30	16, 421	12, 120	3, 119	5, 546	41, 010	1, 288	28, 726	3, 403
	Account Sales	151	26	2, 573	4, 770	294	2, 110	41, 010	1, 288	28, 726	3, 403
	Head per Draft	22, 52	14, 79	2, 591	4, 199	295	1, 311	41, 010	1, 288	28, 726	3, 403
	Head per Owner	92, 85	40, 93	4, 74	3, 02	2, 21	1, 66	1, 51	83	20, 92	2, 94
	Head per Gunner	92, 85	40, 93	28, 43	7, 67	23, 42	2, 79	2, 41	7, 55	67, 91	10, 72
	Head per Account Sale	92, 95	47, 23	28, 35	8, 91	23, 34	4, 50	2, 41	7, 55	67, 91	10, 72
Sheep:	Cars	3, 145	1, 119	748	634	748	634	678, 156	84, 673	473	23, 326
	Decks	3, 205	1, 159	750	647	750	647	678, 156	84, 673	473	23, 326
	Head	235, 335	83, 875	55, 671	40, 388	55, 671	40, 388	59, 095	5, 842	65, 579	5, 994
	Drafts	12, 849	9, 328	6, 007	8, 476	6, 007	8, 476	59, 587	3, 710	407	489
	Owners	3, 067	5, 488	5, 929	5, 123	5, 929	5, 123	59, 587	3, 710	407	489
	Account Sales	3, 065	4, 969	5, 931	4, 072	5, 931	4, 072	59, 587	3, 710	407	489
	Head per Draft	18, 32	8, 99	5, 26	5, 83	5, 26	5, 83	7, 31	14, 49	41, 90	23, 67
	Head per Owner	78, 26	15, 28	105, 24	9, 64	11, 38	22, 82	11, 38	22, 82	161, 12	48, 11
	Head per Account Sale	78, 28	16, 87	104, 84	12, 13	104, 84	12, 13	11, 38	22, 82	161, 12	48, 11
	Calves:										
Hogs:	Cars	5, 481	820	48	23	48	23	243, 474	2, 154	455	8, 906
	Decks	10, 481	1, 491	49	24	49	24	243, 474	2, 154	455	8, 906
	Head	1, 871, 805	192, 452	6, 481	3, 399	6, 481	3, 399	20, 674	2, 112	870	345
	Drafts	10, 680	3, 699	4, 481	3, 374	4, 481	3, 374	16, 635	68	372	229
	Owners	3, 225	2, 243	59	205	59	205	16, 635	68	372	229
	Account Sales	3, 221	1, 627	59	133	59	133	16, 635	68	372	229
	Head per Draft	128, 44	40, 95	13, 53	9, 09	13, 53	9, 09	8, 20	19, 23	128, 37	229, 81
	Head per Owner	425, 37	83, 30	109, 84	16, 58	109, 84	16, 58	14, 64	31, 67	304, 66	229, 81
	Head per Account Sale	425, 89	118, 28	109, 84	25, 55	109, 84	25, 55	14, 64	31, 67	304, 66	229, 81

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122. In preparation for both the first and the second hearing the great majority of the respondents employed a trained and experienced accountant who prepared for each of the years 1929 and analyses similar in purpose to those above described as having been made by the Government accountant, and based them on the audits. At the first hearing the accountants for the Government and for the respondents, respectively, were in disagreement as to the basis to be used in making indirect allocations or distributions of expenses, such as administrative and general expenses, but at the second hearing respondents' accountant, while not endorsing the bases employed by the Government's accountant, did not regard it as worth while to controvert them.

XIX. Items Entering Into Costs

123. Each of the accountants, in making his analysis of the business of the respondents, established a classification of expenses and assigned to it certain items. The classifications are as follows:

Government Accountant:	Respondents' Accountant:
Salaries and Wages.	Salaries and Wages.
Selling and Buying.	Selling and Buying.
Yarding.	Yarding.
Business Getting and Maintaining.	Business Getting and Maintaining.
Office.	Office.
General Supervision.	General Supervision.
Expenses.	Expenses.
Yarding.	Yarding.
Selling and Buying (Horse Expenses).	Selling and Buying (Horse Expenses).
Office.	Office.
Business Getting and Maintaining.	Business Getting and Maintaining.
Administrative and General Risk.	Administrative and General Risk.
Commissions paid (Split Com.)	Commissions paid (Split Com.)
Interest on Following Capital.	Interest on Following Capital.
Fixed Assets (including Exchange memberships).	Fixed Assets (including Exchange memberships).
Working Capital to cover:	Working Capital to cover:
Operating Expenses.	Operating Expenses and Handling Sales and Purchases.

124. It will be observed that with respect to the items of cost, distinguished from the method of arriving at the amounts of the items, the two accountants were in substantial agreement, except that respondents' accountant includes an item for interest on working capital necessary to handle sales and purchases, and also includes an item of interest on capital invested in methods and practices. Neither of these items is covered by the classification established by the Government accountant. Hereinafter, in determining allowable costs, an allowance is made to cover each and every item not included in the classifications of the two accountants; also, similarly, an allowance is made to cover interest on working capital necessary for handling sales and purchases. The methods and practices, the

item, "Commissions paid (Split Commissions)," is included by the Government accountant as a part of the item "Selling and Buying Salaries."

value of which is contended for by respondents as an element of capital, are classified by their accountant under three heads, namely, (1) mailing lists and customer records; (2) office methods, systems, etc., and (3) yard methods and practices.

125. The mailing lists and customer records comprise principally all the names and addresses of those who have patronized and are believed to be still in position to patronize the respective respondent firms who keep the lists. To a lesser extent they contain some names and addresses of those who have not yet patronized the firm keeping the list. These data are acquired and recorded as a part of the normal and usual conduct of respondents' businesses. They are kept on a card or some similar form of record. Such records constitute a part of the property of the respective respondents who keep them. 89 Therefore, their respective values, such as they may hereafter be found to be, are included as a part of respondents' invested capital.

126. The other matters listed as methods and practices constitute those common day by day routines used in the conduct of respondents' businesses, such, for instance, as the methods of yarding, sorting, selling, and weighing livestock in the yard and the practices of making out and transmitting account of sales to the patrons, remitting the proceeds of sale, and keeping records and other similar matters in the office. Respondents' theory is that if no such routines had been used by any one anywhere and respondents were compelled to employ persons to work them out, costs would be incurred in the discovery of them and further costs in the learning of them by respondents and their employees. Their accountant has arrived at some \$66,000 as the total of such costs. These are apportioned among the various firms as representatives. The respondents contend that the amounts apportioned to their respective firms should be regarded for rate making purposes as a part of the capital of such firms, interest on which, they say, should be included in the reasonable costs.

127. These items, namely, value of office methods and customs and value of yard methods and practices are not included in respondents' capital, a return of which is coverable into reasonable rates. The reasons for not including them are as follows:

128. They, like the common routines of everyday life generally, while very useful and practically indispensable, are not the property of anyone. They freely may be adopted and used by any who care to do so without the payment of any price or remuneration to any of the respondents in this proceeding. Knowledge of them is a part of the qualifications of respondents' various classes of workers, whether they be owners or employees. They are, in general, learned while the worker is engaged upon and performing other duties for which he is being adequately compensated. When, hereinafter, an allowance is made to cover the salaries of yardmen, salesmen, office workers, etc., it is not contemplated that it would be just or reasonable to cover into the rates such salaries to be paid to men who were

not acquainted with the common routines necessary in the performance of their work.

90 XX. Reasonable Unit Costs Plus Reasonable Unit Profits to be Covered Into Reasonable Commission Rates

129. There are more firms and a larger personnel on the Kansas City market than are necessary to dispose of shippers' livestock effectively. A smaller number of firms than are now engaged could handle the business more economically. The Packers and Stockyards Act does not clothe the Secretary of Agriculture with authority to determine how many firms would be required to handle the business properly or what specific firms should be engaged in business or whether some firms are unwisely continuing in business. The Act directs him to prescribe reasonable rates. In order to do this some reasonable standard must be adopted. That adopted herein has already been stated in paragraph 114. In applying this standard it is necessary for the rate maker to inform himself with respect to whether each of the respondent firms is conducting its business economically to the end that the schedule of rates prescribed may not pass unnecessary expenses on to those who pay the rates.

130. Commission rate making is a matter of the exercise of well-informed judgment, guided by mathematical calculation. The importance of statistics and cost of operation of each of the respondents lies in the fact that they are a guide to judgment. In arriving at a reasonable allowance to cover the cost of separate functions, the experience of each firm is considered separately. The use of the mathematical average cost of all firms doing business, as a test of reasonableness of rates would carry into the rates, through the aggregate used in arriving at the average, all the unreasonable and extravagant expenditures, if any, incurred under the rates already in existence. Moreover, the unit costs of many of the firms are high because the volume of business coming to the market is divided among too many firms and handled by an unnecessarily large personnel. To consider as reasonable the average of the unit costs so incurred would compel the maintenance, at the expense of the rate payer, of all who wish to engage in the business, even though the volume of business they can command be too small to warrant the organization necessary to handle it. In this connection, it is to be observed that while, for example, one salesman may be able to sell 30,000 head of cattle received by one firm, yet if the same volume be divided between two firms, two salesmen will be required. As a test of the reasonableness of rates, the adoption of the lowest costs incurred by the most economically conducted firm would result in a schedule so low as manifestly to be unreasonable as to some firms of normal efficiency. The adoption of the highest costs incurred by the least efficiently managed firms would result in a schedule so high as to be unfair to all shippers of livestock. This same situation obtains with respect to any functional item of expense incurred by any one firm.

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Since neither the average unit cost of all firms nor the experience of the most efficient firms, nor that of the most inefficient firms, can be taken as a guide to the establishment of rates, some other method of analysis must be adopted.

131. In general, the expenses incurred by commission firms fall into two classes: first, those which the conditions of the business tend to hold down, and, second, those which the conditions tend to increase. In arriving at a reasonable cost to be covered into rates in the case of those functions, the expenses of which are automatically held down, the costs as actually incurred by each of the firms should be considered and the reasonable cost arrived at, giving due consideration to the circumstances under which each of the respondents operates. In case of those costs which the conditions of the business tend to increase, such as the cost of salesmanship and the cost of advertising, expenses as actually incurred by any firm or by all of the firms do not furnish an adequate guide to the reasonableness of such cost. In arriving at a reasonable unit cost on account of these functions some additional procedure of approach has to be adopted. That used is discussed hereinafter in those paragraphs wherein the reasonable allowance is determined. The various functional unit items of cost, the findings as to the reasonable allowance for the various functions and the reasoning employed in arriving at the findings are set forth in the following paragraphs.

Salesmanship

132. An important item to be included in reasonable unit costs is a reasonable amount for salesmanship. This function is performed on the Kansas City market by owners of market agencies and by salesmen employed by them on a salary basis. Each of the accountants found unit costs of this item per species of livestock and also according to the respective modes of arrival.

133. Inasmuch as the selling and buying of livestock requires greater skill and judgment than the performance of any other of respondent's functional activities, with the possible exception of management, the proportion of owners as distinguished from employees engaged in this activity is great. In some firms such owners agreed upon salaries which should be set up on the books for each and paid, if the net result of operations made it possible so to do. In others the owners had merely drawing accounts with division of net owner incomes at the end of a year or some other accounting period. In still others the owners merely divided whatever net owner income happened to arise from the operation. By "net owner income" is meant moneys arising from the operation of the business and available for the personal use of the respective owners, regardless of whether it be considered as compensation for services rendered or profits arising from the ownership of the business or a combination of the two.

134. While the accountant for the Government used, in ascertaining the unit costs of salesmanship, the salaries, drawing accounts and

profits of owner salesmen, as well as the salaries of those who were employed, he neither attempted to pass upon the reasonableness of such salaries, drawing accounts or profits of the owner-salesmen nor recommended the inclusion of those of the owners in the costs which are to be used as the basis of reasonable rates. In this proceeding it is not contended by anyone that these owner salaries, drawing accounts or profits should be used as an element of costs. When, however, they are eliminated, and nothing substituted, it causes the salesmanship costs of so many firms to appear extremely low or be absent altogether that no fair normal can be garnered from the unit costs of the remaining firms for this item. In these circumstances the question becomes one of determining the amounts to be substituted. The record in this proceeding suggests alternative methods. Respondents contend that there should be substituted an amount representing the personal value of each owner-worker as appraised by a committee selected by respondents. Government counsel argue that 93 the unit costs of salesmanship should be ascertained by relating a reasonable annual salary for a salesman to a reasonable year's performance expressed in terms of the units sold, that is, carloads or head, as the case may be, as was done in Docket 143, the Omaha commission rate case (See Tagg Bros. and Moorhead v. U. S. 280 U. S. 420), and in every commission rate order issued by the Secretary of Agriculture since that time.

135. In preparation for a hearing in 1929, and again prior to that of 1931, respondents had an appraisal of the owner-workers made by a committee. The committee which made the appraisal in 1929 consisted of six members, and that making the one of 1931 of eight members. These committees had before them the following classes of information: enterprise with which connected; office held or position occupied; number of active co-partners; proportion of personal time involved; manner in which such time employed and proportion devoted to various activities; term of experience in livestock commission business; term of experience in livestock industry; commissions earned by the enterprise; cash value of sales and purchases made to earn such commissions; and, the number of head of livestock handled by species and in total. These committees did not possess any peculiar qualifications for making this appraisal. Even if the appraisal of services such as these could be considered as a matter determinable by expert opinion, any generally well informed citizen with the information at his disposal which the committees had before them could make an equally trustworthy appraisal. But the rejection of the appraisal method rests upon a further and more fundamental ground in that this method seeks to place upon each responder, worker, by name, an annual value based upon such record of his past performance as was before the committee and above which it is unreasonable for him to earn, regardless of his future accomplishments and below which it is unreasonable to expect him to serve, regardless of the small amount of service he renders. This would seem to be a clear-cut example of the wage

fixing condemned in *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522. As contrasted with this, the performance method urged by Government counsel places no limit, either by way of maximum or minimum, upon the amount of annual compensation which reasonably an owner-salesman may earn. It finds a reasonable compensation to the respondents for the performance of a unit of salesmanship, whether it be done by owner or employee, and leaves the firm in position to expand or contract its reasonable income as it proves successful or unsuccessful in multiplying the units of salesmanship performed. To illustrate, if a fair annual salary be taken as \$4,000 and a reasonable full year's performance as the sale of 29,000 head of cattle, then the reasonable allowance for salesmanship will be 13.79 cents per head and the owner who is able to sell 35,000 head will be entitled to a compensation of \$4,826.50, while one who succeeds in selling only 20,000 head will be entitled only to \$2,758.

136. The record in this case contains all the information which the committees had before them and in addition many other facts pertinent to the determination of the cost of such services as are performed by owners, among which are the prices at which services such as those rendered by the owners are being bought and sold for on an open, competitive market. Such prices are the test generally regarded as proper measures. The record contains some facts which furnish a partial test of the appraisals. Some of the owners whose services in their respective business were appraised by the committee in 1929 later became employees on a salary basis at figures much below those at which their services were appraised. One such owner, a cattle salesman, whose services were appraised by the committee at \$4,000 in 1929 was receiving in 1932 a salary of \$1,700. Another cattle salesman whose services were appraised at \$3,000 in 1929 was receiving a salary in 1932 of \$1,800. In another case a hog salesman whose services were appraised at \$2,500 in 1929 was employed as a cattle yardman in 1932 at a salary of \$875.

137. The evidence shows that an important element influencing the value placed by these committees upon the services of owners was the business drawing power of the owners. These appraisals include also elements on account of risk bearing and executive functions exercised by the owners. All these elements are considered elsewhere and a reasonable allowance made for them in the determination of reasonable unit costs.

138. Since neither owners' salaries, as set up on the books, nor the appraised value of owners' services can be accepted as determinative of the unit costs of salesmanship, some other method must be adopted. That here used is the ascertainment of what the salesman's services are selling for and relating these to what, according to the record, constitutes a reasonable year's work. The salesmanship to be provided for in this order contemplates that it will be of high character, whether performed by

owners or by salesmen employed by them. The shipper is entitled to have his livestock sold by the most efficient and competent salesmen available on the market. Such salesmen, whether owners or employees, are entitled to receive a fair reward for their ability and services. An owner, while entitled to reasonable remuneration for management and the assumption of risk, which are ordinarily referred to as profit, is not entitled merely because he is an owner to more for the act of selling livestock than it would cost to get some other equally efficient salesman to perform the selling service for him.

139. The record contains the number of employed salesmen on the yards in 1929 and in 1931, together with the salaries they drew. There were in 1929, 122 employed cattle salesmen, 42 employed hog salesmen, and 11 employed sheep salesmen on the Kansas City market. In 1931 there were 133 employed cattle salesmen, 46 employed hog salesmen, and 14 employed sheep salesmen. The following table shows the salary range the number of salesmen of the various species in the two years and the salary grades into which they fall:

	1929	1931
no receiving:	6	4
\$6,000 or more	3	5
5,000 to 6,000	13	9
4,000 to 5,000	38	32
3,000 to 4,000	30	50
2,000 to 3,000	32	33
Less than 2,000		
Total	122	133

HOG SALESMEN

	1929	1931
no receiving:	1	none
\$9,300	none	1
8,800	none	1
9,095	2	1
4,000 to 5,000	10	4
3,000 to 4,000	16	20
2,000 to 3,000	13	19
Under 2,000		
Total	42	46

SHEEP SALESMEN

	1929	1931
no receiving:	1	1
\$7,000	1	none
4,970	none	1
4,887	1	none
4,800	4	2
3,000 to 4,000	3	6
2,000 to 3,000	1	4
Under 2,000		
Total	11	14

In order to earn these salaries the employed salesmen performed actual selling and handling livestock in the yards, and spent time in the country doing appraisal and publicity work. The record does not show for employed salesmen the amount of work done by any individual. The average number of head per salesman sold during

the course of the year by the salesman of a firm does not furnish a measure of the ability or the capacity of any individual salesman. The record contains opinions of salesmen as to what they consider a reasonable year's work on the Kansas City market where there are seasonable variations in the receipts of livestock and where the days of heaviest receipts come during the early part of the week.

140. A salesman employed by one of the respondents testified that a good salesman should sell 1,500 cars of cattle in a year. Another witness employed by a respondent stated that a good salesman can sell *well* as much as 2,000 cars per year. Another, a respondent, stated that a butcher salesman could sell 1,600 cars of butcher stuff in a year, and should be able to sell that many cars of steers. He stated also that a hog salesman should sell more than 1,600 cars of hogs, and that a sheep salesman should sell from 1,500 to 2,000 cars of sheep. On one day during the first hearing a salesman who is a member of one of the respondent firms sold about 30 cars of cattle, most of which had been carried over from the previous day on account of an unsatisfactory market. It is the opinion of some of the salesmen that they could sell more livestock than they do sell if they had the opportunity to exercise fully their selling ability.

141. The number of animals per straight car received by the various respondents varies somewhat according to the character of the business done, but the normal and usual number of head of cattle contained in a straight car is approximately 28 head, calves 57 head, hogs 75 head, and sheep 250 head.

142. Giving due consideration to the conditions under which salesmanship is performed on the Kansas City market, the volume of livestock handled by the respective firms and the estimates of salesmen as to what constitutes a reasonable year's work, it would be reasonable to expect a good and experienced salesman to sell in a year from 27,000 to 32,000 head of animals of the bovine species as they arrive at the Kansas City stockyards in the year 1931; a hog salesman from 75,000 to 100,000 head of hogs in a year; and a sheep salesman from 240,000 to 275,000 head of sheep.

143. If the selling of 29,000 head of cattle and calves, which is below the estimate of any witness as to what constitutes a reasonable year's work, be taken as the work to be done in order to earn a salary of \$4,000, which is in the high salary range being paid salesmen on the Kansas City market, the reasonable cost to the shipper on account of the function of salesmanship is 13.79 cents per head. Likewise, if the selling of 85,000 head of hogs be considered a reasonable year's work, and \$3,000, which is in the high salary range, be taken to be a corresponding remuneration, the salesmanship cost to the shipper on account of hogs is approximately 3.529 cents per head. If the selling of 250,000 head of sheep be considered to be a year's work for which a \$3,500 a year salary is compensatory, the reasonable per head cost to the shipper for salesmanship on account of sheep is 1.4 cents per head. On the basis of all the facts in the record it is found that the follow-

constitute reasonable per head costs to be covered into rates on account of salesmanship:

Cattle and Calves	\$0.1979
Hogs	.0353
Sheep	.0140

Yarding Salaries

44. The handling of livestock in the yard occasions expenses on account of salaries paid to those who do the yarding. The amount for the Government allocated yarding salaries direct to species. The per head cost of yarding salaries on account of each species, irrespective of mode of arrival, is shown in the following tables:

CATTLE AND CALVES

Firm No.	No. of head	Yarding salaries	Firm No.	No. of head	Yarding salaries
	3,656	\$0.0064	16	26,673	\$0.0699
	52,225	.0129	14	42,094	.0706
	454	.0140	12	67,947	.0711
	11,360	.0278	26	30,383	.0719
	122,107	.0279	65	40,303	.0720
	14,983	.0311	63	128,888	.0721
	3,113	.0388	75	25,113	.0746
	901	.0395	10	119,514	.0751
	61,658	.0400	52	164,890	.0754
	23,436	.0425	30	32,330	.0811
	185,312	.0481	71	62,038	.0818
	10,731	.0489	6	15,841	.0830
	2,122	.0490	25	53,512	.0840
	28,558	.0496	51	22,495	.0849
	38,997	.0517	29	25,581	.0880
	79,012	.0531	4	35,763	.0895
	34,058	.0535	82	110,419	.1015
	67,492	.0565	36	86,051	.1033
	19,205	.0584	84	67,609	.1044
	157,432	.0619	19	12,570	.1112
	8,750	.0621	78	10,819	.1206
	21,690	.0642	72	2,397	.1295
	59,107	.0650	77	23,436	.1296
	42,359	.0665	13	63,945	.1295
	31,539	.0668	7	15,790	.1353
	61,113	.0676	17	11,336	.1389
	34,942	.0682	76	9,619	.1635
	1,472	.0695	11	1,878	.2130

HOGS

	30,135	.0959	10	96,611	.0305
	12,619	.0060	4	9,552	.0309
	6,015	.0081	46	33,474	.0316
	16,312	.0112	37	35	.0329
	4,738	.0136	26	20,321	.0332
	737	.0151	79	2,969	.0355
	13,628	.0185	75	5,734	.0358
	5,952	.0185	16	8,498	.0357
	70,554	.0196	36	147,922	.0364
	6,196	.0197	7	41,090	.0366
	11,653	.0207	51	159,184	.0367
	2,364	.0207	30	3,489	.0395
	10,192	.0218	12	28,132	.0400
	9,679	.0222	35	12,017	.0421
	399	.0228	13	40,816	.0439
	8,168	.0228	73	34,425	.0507
	11,442	.0230	15	20,743	.0599
	3,727	.0235	9	19,051	.0601
	8,629	.0263	54	27,122	.0632
	150,806	.0263	25	19,201	.0641
	20,323	.0267	11	2,880	.0710
	15,810	.0284	60	21,164	.0721
	4,078	.0287	55	21,227	.0760
	8,191	.0290	14	27,819	.1112
	7,619	.0299	53	18,764	.1211
	6,872	.0300			

Firm No.	No. of head	Yarding salaries	Firm No.	No. of head	Yarding salaries
43	140,481	\$0.0030	1	43,274	\$0.0081
54	591,028	.0084	5	209,208	.0066
35	44,036	.0041	87	96,975	.0063
63	43,330	.0051	59	205,441	.0067
36	36,575	.0065	61	991	.0105
44	267,391	.0078	10	94,843	.0156

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of yarding salaries are as follows:

\$.075 per head as to cattle and calves.

.030 " " " " hogs.

.008 " " " " sheep.

Yarding Expenses

145. The per head cost of yarding expenses on account of each species is as follows:

CATTLE AND CALVES

Firm No.	No. of head	Yarding expenses	Firm No.	No. of head	Yarding expenses
61	10,731	\$0.0003	20	32,320	\$0.0110
37	2,122	.0009	84	67,609	.0114
6	15,841	.0014	77	29,436	.0116
15	14,983	.0026	55	61,113	.0116
78	10,819	.0028	53	28,558	.0121
10	29,673	.0040	17	11,336	.0124
34	52,225	.0045	10	119,514	.0125
88	2,897	.0051	26	30,383	.0127
30	23,436	.0054	36	86,051	.0128
33	1,479	.0054	18	59,107	.0129
56	34,058	.0075	51	22,495	.0133
54	185,312	.0078	25	53,312	.0135
82	110,449	.0080	14	42,094	.0143
13	63,945	.0082	83	122,107	.0146
75	25,113	.0082	29	25,581	.0150
7	15,790	.0084	52	21,690	.0151
46	157,432	.0084	48	42,359	.0154
70	38,967	.0090	23	34,942	.0158
12	67,947	.0093	42	67,492	.0159
65	40,303	.0095	71	8,750	.0169
4	35,763	.0096	63	128,858	.0172
39	61,658	.0100	30	19,205	.0173
62	31,539	.0103	71	62,038	.0181
73	79,012	.0104	19	12,570	.0202
59	164,860	.0105			

14	27,819	.0061	10	96,653	.0004
48	5,952	.0061	52	6,196	.0005
54	27,122	.0101	25	19,201	.0006
61	9,679	.0061	35	12,017	.0006
83	4,078	.0061	77	10,192	.0006
36	147,922	.0061	78	4,738	.0006
4	9,552	.0062	62	15,810	.0007
6	8,168	.0062	73	34,425	.0007
7	41,090	.0062	15	20,743	.0009
18	11,653	.0062	75	5,134	.0010
34	16,312	.0062	79	2,969	.0010
55	21,227	.0062	26	20,321	.0010
59	70,554	.0062	30	3,489	.0011
63	150,806	.0062	71	20,323	.0012
46	33,474	.0063	29	12,619	.0012
82	30,135	.0063	23	1,536	.0013
13	40,816	.0064	42	11,442	.0014
20	3,722	.0064	17	5,872	.0015
51	159,184	.0064	88	249	.0045
53	18,764	.0064	65	7,619	.0068
60	21,164	.0064			

SHEEP

Firm No.	No. of head	Yarding expenses	Firm No.	No. of head	Yarding expenses
18	3,157	\$0.0001	60	753	\$0.0003
46	7,795	.0001	82	2,007	.0003
63	43,330	.0001	53	733	.0005
73	4,035	.0001	75	2,487	.0005
36	36,575	.0001	77	1,635	.0005
13	5,688	.0002	78	3,432	.0005
35	44,036	.0002	15	3,854	.0006
53	3,685	.0002	17	756	.0006
83	2,380	.0002	26	2,657	.0007
6	1,220	.0003	29	734	.0007
20	872	.0003	71	1,414	.0011
25	3,676	.0003	30	533	.0046
81	6,942	.0003	42	1,460	.0130
52	4,320	.0003	65	2,184	.0131

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of yarding expenses are as follows:

\$.014 per head as to cattle and calves.

.0060 " " " " hogs.

.0004 " " " " sheep.

Office Salaries

146. The per head cost on account of office salaries allocated to each of the species is as follows:

101 CATTLE AND CALVES

Firm No.	Number of head	Office salaries	Firm No.	Number of head	Office salaries
6	15,841	\$0.0010	46	157,432	\$0.0550
17	11,336	.0143	54	185,312	.0558
63	122,107	.0203	75	25,113	.0467
71	62,038	.0206	76	9,619	.0570
14	42,094	.0217	73	8,012	.0575
34	52,225	.0239	20	32,320	.0628
35	61,658	.0240	52	21,690	.0629
42	67,492	.0256	7	15,790	.0631
53	28,558	.0330	78	10,819	.0656
13	63,945	.0382	61	10,731	.0692
63	128,888	.0567	23	34,942	.0693
82	110,449	.0373	29	25,581	.0707
10	119,514	.0396	70	58,967	.0730
62	31,539	.0396	25	53,312	.0734
30	23,436	.0414	56	34,058	.0810
55	61,113	.0441	65	40,303	.0879
77	23,436	.0442	74	8,750	.1002
26	30,383	.0447	51	22,495	.1150
60	19,205	.0449	19	12,570	.1192
12	67,947	.0450	11	1,878	.1195
59	164,860	.0158	33	1,479	.1385
18	59,107	.0490	9	3,113	.1472
79	11,360	.0184	37	2,122	.1567
48	42,356	.0452	69	3,656	.1629
36	86,051	.0518	72	2,397	.1794
4	33,763	.0525	67	454	.1821
15	14,983	.0529	85	2,897	.1955
34	67,609	.0534	87	991	.2117
16	28,673	.0544			

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HOGS

Firm No.	Number of head	Office salaries	Firm No.	Number of head	Office salaries
6.	8,168	\$0.0004	10.	96,653	\$0.0013
17.	8,872	.0076	52.	6,196	.0019
34.	16,312	.0115	78.	4,738	.0022
14.	27,819	.0117	70.	13,628	.0036
61.	9,679	.0146	50.	70,554	.0039
71.	20,323	.0152	67.	6,015	.0065
53.	18,764	.0181	12.	28,132	.0084
42.	11,442	.0189	65.	7,619	.0084
63.	150,806	.0194	11.	2,990	.0095
77.	10,192	.0195	20.	3,727	.0103
13.	40,816	.0198	46.	33,474	.0123
29.	2,969	.0209	16.	8,498	.0451
15.	20,743	.0210	75.	5,134	.0363
35.	12,017	.0214	23.	1,536	.0505
51.	159,184	.0229	30.	3,489	.0518
73.	34,425	.0231	33.	1,690	.0537
4.	9,552	.0232	84.	11,944	.0553
76.	8,629	.0232	19.	4,497	.0579
7.	41,090	.0233	9.	19,051	.0585
60.	21,164	.0238	25.	19,201	.0604
55.	21,227	.0253	83.	4,078	.0614
18.	11,653	.0259	74.	2,364	.0687
26.	147,922	.0262	37.	8	.0874
62.	15,810	.0266	56.	8,191	.0933
82.	30,135	.0270	72.	1,077	.0970
48.	5,952	.0278	87.	399	.1030
26.	20,321	.0292	66.	737	.1450
29.	12,619	.0300	88.	249	.2105
54.	27,122	.0514			

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SHEEP

6.	1,220	\$0.0005	52.	4,320	.0189
17.	43,274	.0013	36.	36,575	.0191
1.	756	.0042	51.	6,942	.0194
59.	205,441	.0044	65.	2,184	.0195
44.	267,391	.0055	16.	1,570	.0199
54.	591,028	.0059	23.	862	.0201
35.	150,283	.0067	55.	3,685	.0204
14.	44,036	.0068	12.	3,439	.0206
79.	7,365	.0071	62.	3,065	.0212
18.	2,273	.0074	7.	1,295	.0252
4.	3,157	.0078	46.	7,795	.0264
87.	1,896	.0095	78.	3,432	.0283
42.	96,975	.0102	60.	753	.0284
5.	140,481	.0105	82.	2,007	.0284
83.	209,208	.0108	20.	872	.0291
10.	2,380	.0110	25.	3,676	.0316
76.	94,843	.0113	34.	190	.0341
63.	1,553	.0115	70.	2,507	.0346
15.	43,330	.0131	29.	734	.0374
73.	3,854	.0135	67.	580	.0388
77.	4,035	.0135	48.	430	.0395
42.	1,635	.0149	19.	1,252	.0409
56.	1,460	.0158	11.	175	.0420
13.	4,924	.0158	74.	333	.0475
61.	5,688	.0162	35.	805	.0689
71.	991	.0165	30.	533	.0737
53.	1,414	.0172	37.	321	.0796
75.	733	.0173	9.	595	.1609
26.	2,487	.0181	66.	283	.1764
	2,657	.0185	72.	45	

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of office salaries are as follows:

\$.0525 per head as to cattle and calves.
 .0300 " " " " hogs.
 .0100 " " " " sheep.

Office Expenses

147. The per head cost on account of office expenses allocated to each of the species is as follows:

CATTLE AND CALVES

Firm No.	Number of head	Office expenses	Firm No.	Number of head	Office expenses
88	2,897	\$0.0016	26	30,383	\$0.0328
77	2,122	.0017	78	19,819	.0028
2	2,397	.0091	46	17,432	.0331
1	67,609	.0138	61	10,731	.0345
16	26,673	.0147	70	38,967	.0360
76	9,619	.0158	77	23,436	.0366
103	35,763	.0163	75	25,113	.0371
59	4,860	.0186	71	62,038	.0379
67	4,454	.0190	34	52,225	.0401
23	34,942	.0214	30	23,436	.0402
12	67,937	.021	15	14,983	.0411
54	185,312	.0216	73	79,012	.0419
7	15,790	.0222	35	61,658	.0429
18	59,107	.0232	62	31,589	.0430
41	67,492	.0236	6	15,881	.0434
83	122,107	.0236	82	110,449	.0443
36	86,051	.0238	60	19,205	.0447
42	21,690	.0251	19	12,570	.0455
56	34,058	.0269	79	11,360	.0456
33	1,479	.0272	14	42,094	.0458
65	40,303	.0279	20	32,320	.0461
10	119,514	.0290	13	63,945	.0493
45	42,359	.0291	11	1,878	.0538
17	11,336	.0292	74	8,750	.0543
63	128,888	.0292	29	25,581	.0546
53	28,558	.0301	51	22,495	.0573
25	53,312	.0302	87	991	.1042
55	61,113	.0313	9	3,113	.1947

HOGS

37	35	.0011	42	11,442	.0175
88	249	.0016	12	28,132	.0176
67	6,015	.0038	11	2,990	.0178
76	8,629	.0048	55	21,227	.0179
72	1,077	.0049	6	8,168	.0179
61	9,679	.0073	34	16,312	.0193
4	9,552	.0073	79	2,969	.0198
7	41,090	.0082	54	27,122	.0202
33	1,690	.0106	26	20,321	.0215
51	159,184	.0114	19	4,497	.0220
36	147,922	.0121	10	96,653	.0229
65	7,619	.0121	60	21,164	.0237
16	8,498	.0122	29	12,619	.0239
52	6,196	.0127	14	27,819	.0244
18	11,653	.0130	25	19,201	.0249
83	4,078	.0131	46	33,474	.0255
59	70,554	.0137	13	40,816	.0256
84	11,944	.0142	71	20,323	.0280
63	150,806	.0147	62	15,819	.0288
17	6,872	.0154	20	3,727	.0295
23	1,536	.0157	56	8,191	.0310
77	16,192	.0162	82	30,135	.0311
78	4,738	.0162	75	5,134	.0330
15	20,743	.0163	74	2,364	.0373
48	5,952	.0164	35	12,917	.0382
83	18,764	.0165	87	399	.0502
70	13,628	.0165	30	3,489	.0503
73	34,425	.0166	9	19,034	.0774

SHEEP

Firm No.	Number of head	Office expenses	Firm No.	Number of head	Office expenses
37	321	\$0.0008	77	1,635	\$0.0121
84	150,283	.0017	35	44,036	.0122
59	205,441	.0018	83	2,380	.0125
54	591,028	.0023	25	3,676	.0128
4	1,896	.0031	33	805	.0133
76	1,553	.0032	26	2,657	.0138
18	3,157	.0039	78	3,432	.0140
67	580	.041	55	3,685	.0147
43	140,481	.0042	14	7,365	.0147
57	96,975	.0050	42	1,460	.0149
8	200,208	.0053	46	7,795	.0150
56	4,924	.0053	53	733	.0161
16	1,570	.0055	19	1,252	.0171
44	257,391	.0055	70	2,597	.0173
65	2,184	.0062	1	43,274	.0181
23	862	.0063	6	1,220	.0211
79	2,273	.0070	13	5,688	.0213
52	4,320	.0076	11	175	.0217
17	766	.0082	48	430	.0218
61	991	.0082	20	872	.0223
10	94,843	.0083	62	3,065	.0234
7	1,295	.0086	60	753	.0275
76	1,553	.0089	74	333	.0275
72	45	.0091	29	734	.0280
51	6,942	.0096	71	1,414	.0314
73	4,035	.0097	82	2,007	.0323
12	3,439	.0099	34	190	.0574
63	43,330	.0099	30	533	.0671
15	3,854	.0103	9	598	.1039
75	2,487	.0118			

On the basis of the foregoing and of the general information contained in the record, it is found that the reasonable and normal costs to be covered into rates on account of office expenses are as follows:

\$.0300 per head as to cattle and calves.

.0175 " " " " hogs.

.0050 " " " " sheep.

Business Getting and Maintaining Expenses

148. The per head cost on account of business getting and maintaining expenses allocated to each of the species is as follows:

CATTLE AND CALVES

Firm No.	No. of head	Business getting and maintaining expenses	Firm No.	No. of head	Business getting and maintaining expenses
76	9,619	\$0.0058	16	26,673	\$0.5200
66	3,656	.0107	33	1,479	.0540
67	454	.0170	79	11,364	.0540
15	14,983	.0219	51	22,495	.0543
37	2,122	.0229	36	86,051	.0576
72	2,397	.0241	30	23,436	.0581
(105)	3,113	.0264	87	991	.0599
56	34,058	.0371	55	61,113	.0612
65	40,303	.0371	18	59,107	.0628
61	10,731	.0377	77	23,438	.0632
23	34,942	.0399	78	10,819	.0639
29	25,581	.0455	46	157,432	.0647
17	11,336	.0474	75	25,113	.0656
60	13,205	.0489	6	15,841	.0672
48	42,359	.0508	83	122,107	.0677
7	15,790	.0519	34	52,225	.0699

CATTLE AND CALVES—Continued

Firm No.	No. of head	Business getting and maintaining expenses	Firm No.	No. of head	Business getting and maintaining expenses
13	63,945	\$0.0714	54	185,312	\$0.0924
34	67,609	.0724	19	12,570	.0974
56	164,860	.0732	73	79,012	.1057
35	53,312	.0735	42	67,492	.1112
74	8,750	.0750	70	38,967	.1149
71	62,038	.0756	35	61,658	.1188
52	21,690	.0763	4	35,763	.1232
20	32,320	.0797	63	128,888	.1262
14	42,094	.0780	53	28,558	.1346
82	110,449	.0819	10	119,514	.1448
26	30,383	.0873	62	31,539	.1655
12	67,947	.0884	88	2,897	.2783

HOGS

(100) 76	8,629	.0022	30	3,480	.0265
66	737	.0060	7	41,090	.0267
67	6,015	.0082	83	4,078	.0268
9	19,051	.0082	34	16,312	.0272
72	1,077	.0104	75	5,134	.0277
15	20,743	.0106	25	19,201	.0292
20	3,727	.0130	6	8,168	.0302
56	8,191	.0142	54	27,122	.0302
37	35	.0157	23	1,536	.0309
48	5,952	.0161	46	33,474	.0321
61	9,679	.0161	71	20,323	.0324
65	7,619	.0163	19	4,497	.0327
39	70,554	.0164	13	40,816	.0344
87	399	.0184	55	21,227	.0340
29	12,619	.0191	74	2,364	.0344
78	4,738	.0191	4	9,552	.0353
16	8,498	.0235	52	6,196	.0373
67	6,872	.0238	12	28,132	.0393
10	21,164	.0238	107	30,135	.0394
60	147,922	.0238	63	150,806	.0410
36	1,690	.0240	26	20,321	.0421
33	2,960	.0251	73	34,425	.0467
79	11,653	.0252	53	18,764	.0490
18	11,944	.0255	10	96,653	.0535
84	159,184	.0259	42	11,442	.0544
51	13,628	.0260	35	12,017	.0546
70	27,819	.0261	82	15,810	.0773
14	10,192	.0262	88	249	.1834

SHEEP

76	1,553	.0017	83	2,380	.0199
69	283	.0055	29	734	.0204
56	4,924	.0058	12	3,439	.0206
15	3,854	.0066	44	267,391	.0208
67	580	.0070	25	3,676	.0211
84	150,283	.0081	33	805	.0216
20	872	.0091	108	753	.0217
73	4,035	.0092	70	2,507	.0219
65	2,184	.0093	51	6,942	.0229
87	96,975	.0094	59	205,441	.0234
72	45	.0104	14	7,365	.0236
18	3,157	.0111	7	1,295	.0238
9	598	.0111	30	533	.0241
1	43,274	.0116	10	94,843	.0246
16	1,570	.0120	63	5,688	.0248
55	3,685	.0131	19	1,252	.0254
48	430	.0140	52	4,320	.0262
54	591,028	.0140	71	1,414	.0263
79	2,273	.0141	35	44,036	.0269
37	321	.0142	74	333	.0273
75	2,487	.0155	6	1,220	.0279
23	862	.0158	63	43,330	.0283
4	1,896	.0163	82	2,007	.0305
46	7,795	.0173	26	2,657	.0317
17	786	.0181	43	140,481	.0323
36	36,575	.0181	53	733	.0353
5	209,208	.0194	42	1,460	.0399
61	991	.0195	34	190	.0429
77	1,635	.0195	62	3,065	.0651
78	3,432	.0199			

An amount reasonably necessary for business maintenance is an item properly coverable into a schedule of reasonable rates. Any expenditure above this amount directed toward increasing the volume of business should be recouped from the additional business obtained. Competition in the commission business is extremely keen and results in a race for getting business which does not manifest itself in a reduction of rates but consists largely in efforts by each market agency to take some of the business away from the other market agencies. Since the rates of most of the respondents are uniform, there is little inducement for the shipper to select one market agency in preference to another because of the rates charged. Business is attached in many cases by reason of ties of personal friendship; in other cases by the estimate of the character of services rendered. Each market agency holds its services out to be of the highest quality and endeavors to convince the shipper of this fact. Under these conditions the amount expended for business getting and maintaining is limited only by what can be afforded under the existing rates,

whatever they may be, and by such limits as the respondents impose upon themselves. If excessive expenditures on this account be covered into a rate schedule, every shipper pays to have himself persuaded to send his livestock to one commission firm rather than to another which presumably can serve him equally well. Moreover, as already pointed out, some of the expenditures incurred to get and hold business are covered in general expenditures and in the salaries of salesmen employed, in part at least, on account of the business which they control as well as on account of the salesmanship which they perform. On the basis of all the facts in the record it is found that the reasonable amount to be covered into rates and paid by the shipper on account of business getting and maintaining should not exceed 10 per cent of the total reasonable cost, and reasonable profit.

Administrative and General Expenses

149. The per head cost on account of administrative and general expenses, namely, telephone and telegraph, directors' fees, legal and auditing, taxes, meals, clearing house, general and miscellaneous, allocated to each of the species, is as follows:

CATTLE AND CALVES

Firm No.	Number of head	Administrative and general expenses	Firm No.	Number of head	Administrative and general expenses
67	454	\$0.0038	76	9,619	\$0.0213
72	2,397	.0039	75	25,113	.0220
86	3,656	.0039	65	40,303	.0224
37	2,122	.0091	20	32,320	.0229
17	11,336	.0101	26	30,383	.0229
56	34,058	.0138	16	26,673	.0230
61	10,731	.0141	12	67,947	.0241
9	3,113	.0142	13	63,945	.0244
14	42,004	.0164	110	25,581	.0245
15	14,983	.0182	30	23,436	.0247
11	1,878	.0187	6	15,841	.0250
62	31,539	.0188	52	21,690	.0258
71	62,038	.0209	19	12,570	.0261

CATTLE AND CALVES—Continued

Firm No.	Number of head	Administrative and general expenses	Firm No.	Number of head	Administrative and general expenses
34	52,225	\$0.0263	36	86,051	\$0.0351
34	23,436	0265	60	19,205	0356
46	157,432	0269	59	164,800	0362
54	185,312	0270	10	119,514	0389
25	53,312	0272	23	34,942	0400
42	67,492	0275	84	67,609	0405
46	42,359	0280	79	11,360	0411
7	15,790	0282	4	35,763	0448
33	1,479	0292	63	128,888	0454
55	61,113	0293	35	61,658	0499
70	38,967	0301	74	8,750	0539
18	59,107	0309	78	10,819	0580
82	110,449	0330	83	122,107	0714
51	22,495	0331	87	991	0775
53	28,558	0334	88	2,897	1156
73	79,012	0351			

HOGS

67	6,015	0008	51	159,184	0166
72	1,077	0021	55	21,227	0169
61	9,679	0030	18	11,653	0173
66	737	0036	79	2,909	0178
17	8,872	0054	36	147,922	0178
37	35	0054	53	18,764	0183
9	19,051	0057	60	21,164	0189
11	2,900	0062	16	8,498	0191
111	8,629	0064	12	28,132	0195
70	20,743	0072	75	5,134	0195
15	27,819	0089	4	9,552	0196
14	7,619	0097	42	11,442	0203
65	12,619	0104	46	33,474	0207
29	41,090	0105	25	19,201	0223
27	1,690	0114	63	150,806	0228
36	8,168	0116	82	30,135	0232
6	10,192	0117	54	27,122	0250
77	4,497	0126	59	70,554	0267
10	15,810	0126	78	4,738	0285
62	40,816	0127	23	1,536	0294
13	16,312	0127	10	96,653	0307
34	6,196	0130	30	3,489	0308
82	34,425	0133	74	2,364	0368
73	13,628	0139	87	150,806	0376
70	3,727	0147	83	4,078	0396
29	20,321	0155	84	11,944	0419
26	20,323	0155	35	12,017	0449
71	8,191	0159	88	249	1245
46	5,952	0163			

SHEEP

112					
67	560	0008	19	1,252	0098
56	4,924	0027	62	3,065	0102
54	591,028	0028	13	5,698	0105
17	756	0031	12	3,439	0110
61	991	0033	7	1,295	0110
59	205,441	0035	20	872	0111
87	66,975	0037	10	94,843	0111
43	140,481	0037	23	802	0118
66	283	0039	25	3,676	0120
72	48	0040	6	1,220	0122
76	1,553	0043	29	734	0125
46	7,795	0043	46	7,795	0129
37	321	0044	55	3,685	0131
15	3,854	0046	36	36,575	0131
65	2,184	0050	51	6,942	0139
5	206,208	0051	33	805	0142
84	150,283	0051	36	44,036	0143
18	3,157	0052	70	2,507	0145
14	7,365	0053	113	43,330	0154
79	2,273	0064	71	1,414	0174
75	2,487	0070	53	733	0179
11	175	0078	48	430	0210
52	4,320	0078	60	753	0219
73	4,035	0078	82	2,007	0241
9	598	0079	78	3,432	0250
16	1,570	0080	74	333	0280
4	1,896	0086	83	2,380	0377
77	1,635	0088	30	533	0411
1	43,274	0092	34	190	0418
26	2,657	0093	42	1,460	0519

On the basis of these facts and all the information contained in the record, it is found that the following are reasonable per head costs to be covered into rates on account of administrative expenses:

\$.0330 per head as to cattle and calves.

.0200 " " " " hogs.

.0050 " " " " sheep.

Insurance

150. Many of the risks incident to the conduct of the commission business are insurable; others are not. The expenses on account of premiums paid to carry insurable risks are costs properly coverable into a reasonable schedule of commission rates. Mortgage and theft, fire, and workmen's compensation insurance are the three types most generally carried by the respondents. The expenses on account of carrying these types of insurance are ascertainable and can be expressed in terms of per head costs in the case of each species. Mortgage and theft insurance premiums are quoted by insurance companies in standard cars defined as "25 head of cattle, 60 head of calves, 80 head of hogs, and 100 head of sheep." The rates are 10 cents per carload of livestock irrespective of species. This is \$.00357 per head for cattle; \$.00125 per head as to hogs; and \$.001 per head as to sheep.

151. Workmen's compensation insurance is optional in the states of Missouri and Kansas, in which the respondents conduct their business. Some of the respondents carry this type of insurance; others do not. Nevertheless, it is a legitimate cost to be provided for. A sufficient allowance should be made in the rates prescribed to enable each of the respondents either to carry this type of insurance or to set up a reserve against losses incurred. The cattle facilities of the stockyard company, where the majority of the respondents carry on their business, are located mainly in the State of Missouri, while the hog house is located in the State of Kansas. The auditor for the respondents segregated the expenses which he attributed to workmen's compensation on the basis of salaries paid in the State of Kansas and those paid in the State of Missouri. Premiums on account of this type of insurance are all on the basis of employee payroll. The yardwork payroll on account of hogs is occasioned largely in the State of Kansas, and the yardwork payroll on account of cattle and calves, and sheep is occasioned largely in the State of Missouri. The office payroll is occasioned jointly by all of the livestock handled. The auditor for the respondents attributed to all the firms represented by him \$993.07, premiums on account of workmen's compensation for yard workers, to the State of Kansas; \$7,048.27 to yard workers in Missouri; and \$93.47 to office workers. For all practical purposes he attributed \$993.07 to hogs; \$7,048.27 to cattle and calves, and sheep; and \$93.47 to cattle and calves, hogs and sheep. The two accountants were in practical agreement as to the amount necessary

to provide for insurance premiums. The accountant for the Government set up \$911.76 for all respondents for fire insurance premiums, and the accountant for the respondents who are members of the Exchange set up \$841.40.

152. In considering the reasonable per head expense on account of some other functions the experience of each firm has been gone into and the normal arrived at on the basis of the experience of each individual firm. The use of an average based upon an aggregate of the expenses of the firms under consideration has been condemned and the reason therefor given. In the case of expenses in which the amounts involved are so small, the consideration of the market as a whole or the consideration of the experience of each of the respondents would lead substantially to the same result. Because of this fact the figures for the market as a whole are used in arriving at the reasonable per head costs on account of insurance.

115 153. Premiums for workmen's compensation on account of cattle and calves, and sheep have been allocated to these species on the basis of the yard payroll occasioned by each. All premiums paid in the State of Kansas have been attributed to hogs. Office workmen's compensation premiums and fire insurance premiums are occasioned by all species. The sum of \$93.47, office workmen's compensation premiums, and \$841.40, fire insurance premiums, have been allocated to the various species on the basis of account sales and account purchases. These allocations result in attributing \$7.219 to cattle and calves; \$1.240 to hogs; and \$517 to sheep. The per head expenditure on this basis is \$0.0032 for cattle and calves; \$0.0012 for hogs; and \$0.0003 for sheep.

154. This results in a per head allowance on account of the types of insurance discussed herein of \$0.00677 per head for cattle and calves; \$0.00245 per head for hogs; and \$0.0013 per head for sheep.

Interest on Capital

155. A legitimate cost to be covered into rates and paid by shippers of livestock is a reasonable amount for interest on the capital necessary in the conduct of the commission business. Inasmuch as a separate allowance to cover the uninsurable risks and contingencies is hereafter provided for in profit, the reasonable rate of return herein found represents interest on the use of capital.

156. Three witnesses testified in the second hearing as to what constitutes a reasonable rate of return under the conditions above stated. Two of them were bankers called by the respondents and the third an economist called by the Government. One of the bankers and the economist are in substantial agreement. The economist, who testified first, gave it as his opinion that an allowance of 6 per cent interest on the value of the fixed assets would be reasonable and that a rate somewhere between 6 and 8 per cent on the amount of liquid working capital necessary in the business would be reasonable. One of the bankers called by the respondents gave it as his opinion that the Sec-

retary of Agriculture would act fairly in arriving at a rate of return if he based his conclusions upon this opinion. The other banker called by the respondents stated that, in his judgment, a reasonable rate of return would be 20 per cent. The inference to be drawn from his testimony, however, is that he had in mind an interest rate high enough not only to pay for the use of the capital but also to cover the risks incident to the business. The bank of which he is an official assesses charges against various of the respondents for the temporary overdrafts they make at his bank. The rates charged vary and depend, in part, upon the average amount of the deposits carried by them. He stated that the charge made by his bank to the respondents on these overdrafts would average around 7 per cent.

157. In determining the reasonable amount of capital to be considered in the case of each of the respondents, the amount as determined by the accountant for those respondents who are members of the Livestock Exchange has been considered. A segregation of capital has been made into fixed and working capital. Fixed capital has been taken to be the amount as determined by the accountant for the respondents represented by the following items, namely, furniture, fixtures, and equipment; materials and supplies; Exchange memberships; and mailing lists and customer records. On the value of these, interest at 6 per cent has been computed in the case of each firm. On the amount of working capital determined by the accountant for the respondents interest has been computed at 7 per cent. The sum of the interest on fixed assets and interest on working capital, expressed in cents per head, has been set up as to each firm.

158. The following tables set forth by firms the per head interest on account of selling, calculated on the basis stated above:

CATTLE AND CALVES

Firm No.	No. of head	Interest	Firm No.	No. of head	Interest
48	35,376	\$0.0022	30	27,615	\$0.0139
19	9,941	.0031	53	26,901	.0141
84	62,243	.0051	26	28,553	.0144
87	953	.0053	7	14,931	.0147
59	138,133	.0055	61	10,042	.0147
34	26,850	.0069	78	7,125	.0153
54	117,345	.0069	15	12,797	.0155
55	47,630	.0070	74	5,732	.0162
83	45,799	.0071	9	2,191	.0163
82	90,682	.0076	29	24,297	.0174
51	22,013	.0078	6	10,253	.0178
46	99,113	.0084	16	23,073	.0184
63	89,771	.0092	62	28,109	.0187
13	55,362	.0093	77	21,031	.0187
65	35,698	.0097	35	35,998	.0189
56	29,689	.0100	4	33,160	.0193
117	50,341	.0101	17	9,707	.0215
42	32,595	.0102	52	18,614	.0231
70	46,755	.0109	76	6,872	.0265
18	9,475	.0115	66	1,503	.0324
79	20,363	.0116	60	14,265	.0374
75	42,045	.0118	88	2,273	.0463
25	53,940	.0122	72	1,934	.0494
71	35,159	.0125	11	1,708	.0529
14	26,219	.0125	67	382	.0594
23	73,218	.0125	37	2,122	.0624
73	59,216	.0130	33	1,218	.0737
12	22,770	.0134			
30					

HOGS

Firm No.	No. of head	Interest	Firm No.	No. of head	Interest
61.....	8,501	\$0.0007	6.....	7,902	\$0.0051
19.....	3,008	.0009	16.....	8,425	.0051
50.....	64,906	.0016	23.....	1,536	.0055
51.....	156,853	.0017	4.....	9,171	.0055
53.....	20,575	.0020	62.....	13,594	.0056
54.....	23,261	.0021	15.....	20,406	.0059
46.....	32,905	.0025	17.....	6,258	.0063
56.....	7,899	.0027	35.....	11,773	.0067
63.....	116,670	.0027	52.....	6,193	.0071
74.....	13,427	.0028	76.....	7,986	.0078
31.....	11,223	.0028	87.....	226	.0078
13.....	40,786	.0028	82.....	29,780	.0081
15.....	11,358	.0029	84.....	9,880	.0086
42.....	11,015	.0031	73.....	18,729	.0086
65.....	7,610	.0032	66.....	737	.0103
71.....	20,141	.0036	60.....	19,875	.0107
48.....	5,893	.0036	78.....	3,260	.0111
25.....	18,661	.0036	79.....	2,969	.0126
20.....	3,727	.0039	77.....	9,507	.0129
14.....	27,771	.0039	72.....	1,045	.0134
12.....	27,121	.0039	11.....	2,990	.0150
53.....	18,759	.0041	75.....	4,922	.0174
7.....	37,426	.0043	67.....	6,931	.0177
26.....	20,075	.0044	74.....	2,364	.0185
9.....	17,642	.0045	33.....	1,690	.0215
29.....	12,428	.0048	83.....	3,292	.0634
30.....	3,489	.0048	88.....	422	.0942

SHEEP

19.....	741	.0003	12.....	2,480	.0028
31.....	6,196	.0007	7.....	1,295	.0031
50.....	191,587	.00076	73.....	3,770	.0031
44.....	248,022	.00084	16.....	359	.0033
54.....	565,861	.00096	77.....	1,532	.0034
53.....	2,947	.0012	17.....	439	.0037
13.....	5,687	.00137	4.....	1,583	.0038
56.....	4,924	.0014	76.....	1,356	.0038
63.....	24,716	.00144	84.....	105,847	.0039
5.....	205,880	.00145	66.....	283	.0044
61.....	638	.0016	78.....	3,432	.0046
70.....	2,484	.0016	1.....	42,372	.00492
46.....	7,002	.0017	53.....	805	.00493
57.....	93,327	.00175	20.....	511	.0052
15.....	3,805	.0018	82.....	1,927	.0052
65.....	1,284	.0018	75.....	2,487	.0062
18.....	2,732	.0020	79.....	2,237	.0062
25.....	3,067	.00212	53.....	534	.0073
62.....	3,063	.0022	29.....	734	.0068
26.....	2,544	.00229	11.....	175	.0064
118 9.....	598	.0023	37.....	321	.0084
67.....	500	.0023	14.....	6,916	.0089
35.....	40,948	.00245	33.....	805	.00947
1.....	1,220	.0026	83.....	1,645	.0235
32.....	4,981	.0026			

It is found that the following are reasonable allowances per head on account of interest:

\$.015 per head as to cattles and calves.

.007 per head as to hogs.

.004 per head as to sheep.

Profits

159. In addition to producing reasonable per head costs incident to the handling of the different species of livestock, reasonable rates should provide also for a per head profit, that is, compensation for management and the carrying of uninsurable risk. The two co-

operative market agencies and some of the other respondents are managed by employees. The remuneration received by employee-managers gives some indication as to what efficient management costs. In 1929 two of the respondent firms had employee-managers who did no selling. The cost of management was 92 cents per car in the case of one, and 99 cents in the case of the other. In 1931 the same two firms were paying a dollar per car and 80 cents per car. A per-head allowance on the basis of one dollar a car as to each species has been made on account of management.

160. The risks assumed by respondents may be said to fall roughly into three general classes. First, those against which insurance actually is carried by at least some of the respondents. Second, those of such a nature that insurance against them is conceivable, though not actually obtainable. Third, those involving a decline in, or cessation of respondents' businesses. The first class has been covered by an allowance in the reasonable cost under the item "insurance."

161. The second class comprises whatever liability respondents assume when they sell livestock, the title to which is defective; errors entering into accounting processes; failure of purchasers to make payments; litigation arising on account of bank failures; freight undercharges; and sales of diseased or defective livestock.

119 The experience of the respondents as reflected in the audits of their books and accounts for the years 1929 to 1931 indicate that the losses suffered on account of the risks of this class amount to only a few cents per car. A per head allowance on the basis of 10 cents per car as to each species has been made on account of this class of uninsurable risk.

162. The third class consists of the danger that, through economic changes or failure of those in charge of the businesses properly to conduct them, the volume of business enjoyed may decline even to the point where it becomes impracticable to continue the conduct of the business. It seems quite clear that nothing should be included in the rates to cover risks or losses due to bad management. It may be that the same is true of risks and losses arising from economic changes. But whoever should bear these risks there is no practicable way of appraising them. The rates hereinafter prescribed represent something more than the reasonable cost plus reasonable profit. That something consists of a substantial spread between the total of the reasonable costs and profits as found and the rates as prescribed, and is more than the amount reasonably to be allowed to cover such errors and omissions as may have crept into the rate making process.

Summary of Reasonable Selling Costs Plus Reasonable Profits

163. A summary of the foregoing findings as to reasonable per head costs and reasonable profits for selling each species of livestock arriving at the Kansas City market is as follows:

	Cattle and Calves	Hogs	Sheep
Managership.....	\$0. 1379	\$0. 0353	\$0. 0140
Advertising Salaries.....	.0750	.0300	.0080
Advertising Expenses.....	.0140	.0060	.0004
Office Salaries.....	.0525	.0300	.0100
Office Expenses.....	.0300	.0175	.0050
Business Getting and Maintaining.....	.0450	.0180	.0059
Administrative and General Expenses.....	.0330	.0200	.0050
Insurance.....	.0070	.0025	.0013
Interest.....	.0130	.0070	.0040
Total Cost.....	.4094	.1963	.0536
Profit:			
To cover management.....	.0360	.0133	.0040
To cover uninsurable risks.....	.0035	.0014	.0004
Total reasonable cost and reasonable profit.....	.4479	.1810	.0580

164. The audits covering the respective years 1929 and, 1931 show, as a rule, only slight differences in the expenses of the respondent firms who operated in both of those years. There occurred, too late to be reflected in the audits for 1931, increases in certain of respondents' lesser expenses, such as postage and taxation, but through salary and wage cuts, also made too late to be reflected in the audits, there occurred considerable decreases in one of the major expenses of the business. It follows, therefore, that the above stated costs cover the situation as it existed before the depression brought about reductions in expenses.

Buying Costs

165. Most of the respondent commission firms and all of the respondent order buyers are engaged in the buying of livestock on a commission basis. The commission men consider their buying activities as supplementary to their selling activities. Some of the salesmen also buy. In some firms there are those employed as buyers only. For the most part the same personnel employed in one activity is also engaged in the other. This is particularly true with respect to the office and yard forces. Most of the items of costs incident to the business of the commission firms are incurred jointly in selling and buying. Their unit costs for buying are the same in amount as those shown above for selling, except as to the items for salesmanship and for interest.

166. The record indicates that in the normal course of business a competent buyer can buy as many animals of a species as an equally competent salesman can sell. This fact, coupled with buying salaries paid, indicates that the cost to the respondent commission men for buying a unit of livestock is somewhat less than the cost of selling a like unit. Somewhat more capital is needed in the buying of livestock than in the selling of it. The interest cost is, therefore, somewhat greater.

167. An analysis of the costs incurred by those respondents engaged solely in the order buying business leads to the conclusion that

their unit costs for buying do not vary greatly from those incurred by the commission men in their buying activities.

168. On the basis of all the facts of record and the inferences
121 to be drawn from the record, it is found that the rates charged for buying livestock on the Kansas City market should not exceed those for selling livestock.

XXI. Rate Structure

169. Livestock does not arrive at market in standard units. It may arrive in lots of from one to many head. On the one hand such consignments may be of the same grade and may sell at one price, and require only one draft; on the other hand it may consist of many classes sold to various buyers and require numerous weight drafts. Obviously, the work occasioned in handling livestock under such circumstances will vary greatly and the cost of performing the service on different consignments will vary also. A tariff of rates and charges constructed to meet each variation and to assess precisely the cost occasioned by handling each consignment against that particular consignment, would be unduly complex. A schedule of rates which attempted to do exact justice by every consignment would be so complex as to be difficult of interpretation and impracticable of application. A tariff simple enough to be practicable and easy of application will work some inequities in some individual cases. A reasonable schedule of rates should do as nearly exact justice as is practicable. Therefore, the rate maker's problem is to find a structure which, when applied to the particular businesses under consideration, will avoid as far as possible unwieldy complexity on the one hand and on the other a simplicity which brings about too many arbitrary distinctions and too much inequity. From time to time attempts have been made to smooth out all arbitrary distinctions. The result has been not only a complexity undesirable in itself but also the creation by such complexity of new inequities. It is recognized, therefore, that any tariff structure which may be adopted can be applied to circumstances which, though not unique, are unusual, and thereby shown to work inequities. Bearing this in mind, balancing advantage against disadvantage, it is believed that a tariff structure only sufficiently complex to avoid serious inequities with respect to normal transactions is to be preferred.

170. Except as to Tariff No. 3, hereinafter discussed, market agency rate schedules at Kansas City have in the past been based quite generally upon the carlot of livestock as the unit of charge. The reason for this has been that the carlot has been the unit of handling.
122 Until comparatively recently practically all the livestock handled by market agencies at the Kansas City stockyard arrived there in railroad cars. The sales pens in the stockyard were constructed to hold one carlot comfortably and conveniently. It was the custom of buyers to buy by the carlot. In probably the majority of instances the single carlot was synonymous with the single con-

signment. With the growth of the practice of bringing livestock to market by motor truck and the increasing custom of buyers to purchase animals in less than carlots, as hereinbefore described, these conditions changed.

171. The filing by the great majority of the respondents of their Tariff No. 3 raises in this proceeding an issue not heretofore present in commission rate determinations made by the Secretary of Agriculture, namely, whether the rates prescribed by this order should be set up in the structure heretofore customary, or according to that desired by the respondents last above referred to, or in some modification of one or the other of those structures.

172. The record here shows that the consignment is the unit of handling. The consignment is, therefore, the unit of cost. Many items of cost attach to the consignment is substantially the same amount, regardless of whether it contains many or few animals. The identity of a consignment must be preserved throughout its entire handling in the stockyard; it must be separately accounted for by the office force. Some items of cost tend to increase as the number of animals in a consignment becomes greater, but probably none increase in direct proportion.

173. Certain modes of arrival of animals at the stockyard affect the number of animals contained in the respective consignments. On the whole, a thousand head of animals arriving by truck will represent more separate consignments than a similar number arriving by rail. This fact has caused it to be said that the so-called "truck-ins" are more expensive to handle than the rail arrivals, but analysis of the costs shown in the record, as well as the opinions of competent witnesses therein contained, compel the conclusion that it is not the mode of arrival but the average size of the consignment which fixes the per head cost of handling the animals. To base differentials in rates

up the modes of arrival is therefore to attack the problem indirectly rather than directly and produces different charges

for handling the same species, number, weight, kind, grade, and quality of animals in two separate consignments merely because one happened to come to the market in a vehicle propelled by gasoline and the other is one drawn by steam.

174. The various commission rate tariffs in force from time to time at the Kansas City stockyard since the effective date of the Packers and Stockyards Act, 1921, are in the record. At least since that date the tariffs have always contained some rates stated on a head basis, and they have also recognized at least one rate distinction based on differences in weights. Reference is here made to the common provision that bovine animals weighing on the average 400 lbs. or less, and called "calves," are handled at rates considerably lower than those weighing more than 400 lbs., and called "cattle." That this is purely a weight distinction becomes apparent when it is borne in mind that it is the average per head weight of the entire draft which controls and that thereby a 1,500 lb. bull may become a calf

by being weighed together with a sufficient number of bovines weighing from 200 to 300 pounds each.

175. In the filing of Tariff No. 3 respondents sought to readjust the structure of their schedules to the changed character of their business. In the formulation of this new tariff they tested certain suggested schedules by practical applications of them to the transactions they actually were handling. By a process of trial and error they arrived at a tariff which, though not going so far as some of them advocated, nevertheless constituted a step in the direction of a structure better fitted to the business of today than was the structure which it replaced.

176. At the last hearing in this proceeding this tariff structure was subjected to close scrutiny and analysis. The evidence compels the conclusion that while some inequities would result from an application of the principles upon which it was based, nevertheless on the whole such inequities are both fewer and less severe than those which would result from the application of the principles which had been discarded. Certain characteristics of this Tariff No. 3 appear to do violence to the basic principles upon which it rests.

There is, for instance, no difference in the rates for calves or cattle coming in by truck, as compared with those arriving by rail, but 5 cents more per head is charged for truck-in yearlings than for those coming in railroad cars, and quite generally the rates on truck-in sheep are higher than for those coming by rail. Also, a lower rate is made for so-called "yard sales" or "seconds," than for freshly arriving livestock.

177. The tariff structure adopted in this order eliminates these and other inconsistencies but otherwise follows in structure the aforesaid Tariff No. 3. It contains for the bovine species a weight class known as "yearlings," and a weight distinction as between light swine or pigs and heavy swine or hogs. In recognition of the fact that, as heretofore stated, the cost of handling a consignment does not increase directly in proportion to the increased number of head in the consignment, the tariff structure here adopted uses a consignment charge graduated according to the number of head in the consignment.

178. That which has been said with respect to the structure of the schedule for selling applies also to the structure for buying.

XXII. The Reasonableness of Existing Rates

179. Upon the basis of the reasonable costs hereinbefore determined, and upon a consideration of the entire record, it is found that respondents' schedules of rates and charges now under investigation contain rates and charges which are unreasonable and unjustly discriminatory.

XXIII. Reasonable Rates

180. Upon the basis of all the foregoing and the entire record, it is found that rates not in excess of the following are schedules of just and reasonable rates:

Article I—Definitions

Calves are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 400 pounds or under. Yearlings are animals of the bovine species, weighed in drafts, the average weight of the animals in which is from 401 pounds to 800 pounds.

Cattle are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 801 pounds or over.

Pigs are swine, weighed in drafts, the average weight of the animals in which is 130 pounds or under.

Hogs are swine, weighed in drafts, the average weight of the animals in which is 131 pounds or over.

A Draft is all those animals in one consignment weighed as a single sales or purchase classification.

A Consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day, provided, however, that when the livestock of several owners arrives in one car, and in not more than one car, each species in that carlot shall be considered as one consignment.

A Consignment, for the purpose of assessing buying charges, is all the livestock of one species bought at any time but shipped or delivered to one person on one market day.

A Person is an individual, a partnership, a corporation, and/or an association of any such acting as a unit.

Article II—Selling Charges

Section A. Calves, Yearlings, and Cattle

Calves:	
Consignments of one head.....	40¢ per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	25¢ per head
Each head over 20.....	15¢ per head
Yearlings:	
Consignments of one head.....	80¢ per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	45¢ per head
Each head over 20.....	25¢ per head
Cattle:	
Consignments of one head.....	80¢ per head
Consignments of more than one head:	
1 to 20 head, inclusive.....	70¢ per head
Each head over 20.....	50¢ per head

Section B. Swine

Pigs:	
Consignments of one head.....	35¢ per head
Consignments of more than one head:	
1 to 40 head, inclusive.....	20¢ per head
Each head over 40.....	5¢ per head

Hogs:

Consignments of one head.....	35¢ per head
Consignments of more than one head:	
1 to 40 head, inclusive.....	25¢ per head
Each head over 40.....	5¢ per head

Section C. Sheep or Goats**Sheep or Goats:**

Consignments of one head.....	35¢ per head
Consignments of more than one head:	
For the first 10 head in each 300 head.....	25¢ per head
For the next 50 head in each 300 head.....	15¢ per head
For the next 60 head in each 300 head.....	5¢ per head
For the next 130 head in each 300 head.....	2¢ per head
For the next 50 head in each 300 head.....	1¢ per head

Article III.—Extra Service Charges

The following extra service charges are applicable to all species:

For each additional weight draft over 3, on account of sales classification.....	15¢
For each additional check, each additional account of sales, each proceeds deposit or bank credit over 1.....	5¢

Article IV—Buying Charges

The rates for buying livestock of the various species shall not be in excess of those for selling like species.

Order

It is Ordered that the respondent market agencies, and each and every one of them, on and after 30 days from the date hereof, 127 cease and desist from demanding or collecting for any stockyard service the rate or charge shown therefor in the schedule of rates and charges now on file with the Secretary of Agriculture.

It is Further Ordered that on and after 30 days from the date hereof neither the respondent market agencies nor any of them shall publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service.

It is Further Ordered that at least ten days prior to the date upon which this order becomes effective each and every of the respondent market agencies publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, and the regulations of the Secretary of Agriculture thereunder, a schedule showing all rates and charges for the stockyard services furnished by such respondent at the Kansas City Stockyards, Kansas City, Missouri, and all rules and regulations changing, affecting, or determining such rates or charges, and that no rate or charge so shown for any such stockyard service be in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for such service.

It is Further Ordered that a copy of this order be transmitted by registered mail to each and every one of the respondent market agencies.

In Witness Whereof the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington this 14th day of June 1933.

HENRY A. WALLACE,
Secretary of Agriculture.

Exhibit B to petition

UNITED STATES OF AMERICA

Before the Secretary of Agriculture

Bureau of Animal Industry

2328. Docket No. 311

SECRETARY OF AGRICULTURE, COMPLAINANT

vs.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVE STOCK
COMMISSION COMPANY ET AL., RESPONDENTS

Petition for Re-investigation and Re-hearing

Comes now Fred O. Morgan, doing business as Fred O. Morgan Commission Company, a respondent herein, and respectfully petitions the Secretary of Agriculture that the Order under date of June 14, 1933, signed by Henry A. Wallace, as Secretary of Agriculture, in the above entitled proceeding be withdrawn and for naught held, and that these proceedings be re-opened for further hearing and re-investigation of the matters and things referred to in the Order of Inquiry and Notice of Hearing, and in said Order mentioned, for the reasons hereinafter stated:

I

Because the said Order purports to be based and predicated upon conditions shown by the evidence to have existed in respect to the business transacted by this respondent as a registered market agency at the Kansas City Stockyards in the year 1931 and prior thereto, and in the period intervening between December 31, 1931, and June 14, 1933, the date of said Order, and particularly during the year 1933, important changes have taken place in the conditions surrounding the operations of respondent as a market agency at the Kansas City Stockyards of such a nature as to cause, so far as the determination of the matters in said Order of Inquiry referred to are concerned, the evidence so taken and considered to be inaccurate, incomplete,

and in certain respects misleading as an expression of the present or future conditions as to revenues or costs affecting respondent's business. Changes occurring since the year 1931 affecting the issues in this proceeding are in part as follows:

129

Reduction in Value of Dollar

(1) There has been in the year 1933 as a result of governmental action a substantial reduction in the purchasing power and value of the dollar in which the amount of rates and charges is expressed by the Order. The effect of this reduction, amounting as of this date to approximately 20 per cent, is given no consideration by the Order. It has already resulted in a general advance in prices and in the immediate future will inevitably further increase the expense of operating the business of respondents.

(2) The audits made by the government accountants in this proceeding disclose that in many classifications of service, the wages paid to employed workers, in 1931, were very meager. These wages have since been substantially reduced and are now at the absolute "starvation point" in view of recent increases in "cost of living." The hours of work are long. Enforcement of the Order would demand further reduction in personnel and wages. This would not be in the interest of the shippers of live stock, or in harmony with the spirit and purpose of recent Federal legislation and utterances of the President of the United States. The President in his radio address on May 8, 1933, said:

"The administration has the definite objective of raising commodity prices to such an extent that those who have borrowed money will, on the average, be able to repay that money in the same kind of dollar which they borrowed.

"We do not seek to let them get such a cheap dollar that they will be able to pay back in great deal less than they borrowed.

"In other words we seek to correct a wrong and not create another wrong in the opposite direction. That is why powers are being given the administration to provide, if necessary, for an enlargement of credit, in order to correct the existing wrong. These powers will be used when, as, and if it may be necessary to accomplish the purpose."

Chicago Rates Undetermined

(3) A hearing is now being held at the Chicago Union Stock Yards under order of the Secretary in respect to the rates and charges of market agencies at that stock yards. As shown by the evidence taken at the hearings in this proceeding the rates and charges of market agencies at Chicago were, at the outset of the inquiry, substantially in excess of rates and charges for similar services of this respondent. Since the reduction of approximately ten per cent made by this respondent in 1932 the rates and charges at Chicago are approximately 25 per cent in excess of the rates and

arges of respondent at Kansas City, and in respect to many com-
n or usual consignments of livestock, more than 33 1/3 per cent
excess of respondent's rates and charges. The reduction pro-
sed by the Order in respondent's rates, which are fixed at levels
stantially below similar rates at any other market, would so
turb and render non-uniform the rates and charges at these two
ortant competitive markets as to demand and suggest deferment
the effective date of the order herein, and a re-hearing to the
that consideration might be given by the secretary after re-
wing the evidence taken in Chicago to the subject of uniformity
of rate structure at the two competitive markets.

(4) The undisputed evidence at the hearings in this pro-
ceeding disclosed higher market agency operating costs at Kan-
City than at others of the five leading competitive markets due to
ater variability of volume of receipts of livestock at Kansas
y; greater diversity in grades of livestock received; delivery of
cked-in livestock to market agencies at unloading chutes instead
at pens assigned to agencies; the greater area from which re-
pts are drawn; the large proportion of stocker and feeder cattle
dled necessitating double contacts with sellers in the west and
ers in central and eastern portions of the United States; and
reased expenditure of money and effort in connection with ap-
ising, supervising, and pasturage of livestock en route to market.

(5) The evidence showed that peak receipts by month or week at
ansas City were equal in volume as to cattle to peak receipts by
ath or week at Chicago, although the average volume at Kansas
y was approximately fifty per cent of the average at Chicago.
pite the higher prevailing rates at Chicago as the Order states,
percentage of livestock marketed from the territory tributary
Kansas City at Chicago, as well as at other markets with higher
s and charges, has been increasing.

(6) A statement showing the rate differentials on representative
signments of cattle between the rates approved by the Order
those now in effect at other markets follows:

	Yea! calves under 400#. avg. car 75 head	Stk. calves under 400#. avg. car 60 head	Fed yrlys. 650-800#. avg. car 35 head	Stkr. yrlys. 400-700#. avg. car 45 head	Fat hvy. cattle 1,300-1,400#. avg. car 20 head
Order 7-14-33.....	13.25	11.00	12.00	14.00	14.00
seph.....	16.50	16.50	16.50	16.50	13.00
ut.....	15.50	15.50	15.50	15.50	13.00
.....	15.00	15.00	15.00	15.00	15.00
go.....	22.00	20.00	21.00	21.00	17.00

	2 avg. cars 150 head	2 avg. cars 120 head	2 avg. cars 70 head	2 avg. cars 60 head	2 avg. cars 40 head
Order 7-14-33.....	24.50	20.00	26.75	26.25	24.00
seph.....	33.00	33.00	33.00	33.00	26.00
ut.....	31.00	31.00	31.00	31.00	26.00
.....	30.00	30.00	30.00	30.00	30.00
go.....	44.00	40.00	42.00	42.00	34.00

131 **Gross Income of Respondents Already Down 40% Since 1929 and Further Reduction as Contemplated by Order Would be Confiscatory.**

(7) Comparisons applying to 40 of the respondents (exclusive of co-operatives) doing the largest volume of business, have been made of gross revenues received during the year 1932 and during the first five months of the current year (1933) with the gross revenues received in the prior years of 1929 and 1931 as shown by government audits of the business of the same respondents. Inclusion of the two cooperative agencies which handle approximately ten percent of the total volume of livestock receipts would not substantially alter the percentages of decrease. Gross revenues as compared with 1929 decreased 13% in 1931, 24.54% in 1932, and for the first five months of 1933 were 42.34% less than the gross revenues for the first five months of 1929. The income of these respondents derived from selling commissions for the first five months of 1933 was 18.96% less than their income during the first five months of 1932. If comparisons were made with gross revenues during the years prior to 1929 the percentage of reductions would be much greater. This indicates that these respondents, faced with higher living costs as they are, have taken even greater punishment through reduction of income than the stockmen whom they represent at the market.

(8) This respondent has reduced expenditures in every possible direction consistent with retaining in the public interest efficiency in the rendition of stockyard services. Certain overhead costs such as rent, utility service, transportation, taxes, etc. which the record shows have increased on an average of more than 200% since 1913, respondent is powerless to reduce in amount if expected to continue in business. After all possible expense reductions have been made and all practicable economies effected, the owners of respondent's business are now receiving no fairly compensatory return for the time, effort, and money expended and used therein. The rates proposed by the order would further reduce gross revenues of this and the other respondents mentioned by an average of not less than 15.23 per cent in respect to cattle and calves; by not less than 2.49 per cent in respect to hogs; and by not less than 11.90 per cent in respect to sheep. Upon cattle weighing from 400 to 800 lbs. the reductions amount to 29.28 per cent of present revenue. It is manifest that such a reduction superimposed upon reductions already in effect under present conditions would either compel respondent to cease business or impair the efficiency of the stockyard services rendered by respondent. Enforcement of the order as made would produce a result entirely out of harmony with the policy of the present administration as announced by the President of the United States in his radio address delivered May 8, 1933, when he said:

"Further legislation has been taken up which goes much more fundamentally into our economic problems. The farm relief bill seeks by the use of several methods, along or together, to bring about

an increased return to farmers for their major farm products, seeking at the same time to prevent in the days to come disastrous overproduction which so often in the past has kept farm commodity prices far below a reasonable return. This measure provides wide powers for emergencies. The extent of its use will depend entirely upon what the future has in store.

132 "Well considered and conservative measures will likewise be proposed which will attempt to give to the industrial workers of the country a more fair wage return, prevent cut-throat competition and unduly long hours for labor, and at the same time to encourage each industry to prevent overproduction."

Impairment of Selling Efficiency Injures Stockmen

(9) The effect of loss of selling efficiency is demonstrated beyond question by respondent's Exhibit #248. As a result of the greater rapidity of salesmanship demanded in handling drive-ins as compared with rail consignments, hogs arriving by rail sold at an average of \$1.70 per head more than those delivered by truck. Trucked-in hogs average higher in grade and quality at Kansas City than those received by rail. This difference is eight times the present commission charge. Important differences exist in the per head selling price of other species in favor of the rail consignments but no accurate comparison could be made as to the relative quality of the average receipts of those species as between rail and drive-in consignments. The evidence is clear and positive. Producers of livestock who testified at the hearing were well justified in making the statements, repeatedly emphasized, to the effect that they were more interested in the efficiency of salesmanship than in the amount charged therefor. This is the practical consideration which must be given the greatest weight in determination of livestock commission charges. One man might sell a very large volume of livestock in a day on any public market if he is at all willing to sacrifice the interest of his principals. The most inexperienced, or the least energetic or the dishonest agent can consummate sales with greater rapidity than the salesmen of experience, energy, and integrity. The stockman knows that cheap or underpaid salesmanship is costly salesmanship.

Other Changes Since Hearing

(10) The abolition at the Kansas City Stock Yards as of July 1, 1933, of the activities of the Bureau of Markets in respect to livestock, and the order of the Farm Credit Administration on June 5, 1933, relating to the consignment to affiliates of the National Livestock Marketing Associations, of livestock upon which Regional Agricultural Credit Corporations have loaned money, have served to radically alter the conditions upon which the Order as made was predicated, and under which the respondents must henceforth operate.

Revenue Yield of Rates Undetermined by Order

(11) It is highly important that the Secretary be correctly advised as to the effect the rates and charges approved will have upon respondent's income. The evidence disclosed that this effect can only be determined through an actual application of the rates and charges to the consignments handled by respondent during a representative period. At the time the present schedule of this respondent was filed in May 1932, as shown by the evidence, accountants for the Secretary estimated a reduction of only four per cent in the yield of those rates as compared with the schedule theretofore in effect. Accountants for the respondents made an actual application of the new schedule to the business for the respondents for the year 1931. This demonstrated that the actual reduction, if these rates had been in effect during that year, would have been 9.2 per cent. It now appears through the actual use of the new schedule, due to the changing consist of the volume of the business handled, depreciating its revenue producing ability, that the percentage ascertained by respondent's accountants was less than actually experienced. The actual operations of forty of the respondents handling the largest volume of business, exclusive of co-operatives, shows that in the first five months of 1933 when the new schedule was in effect, their gross income from selling rates was less by 18.96% than their total gross income from selling commissions during the same five months of 1932, when the former schedule was in effect. A very small portion of this reduction in income was due to a diminished volume. A change in the consist of the business handled, from rail consignments to truck-ins, for example, increased the effect of the reductions contained in the schedule as compared with the reduction that would have occurred had the new schedule applied to the particular volume handled in 1931.

(12) The accountants for the Government did not assemble through the audits made by them information which enabled them to apply to actual consignments a tariff similar in form and structure to that approved by the Order. Advantage was not taken of the offer of the respondents to permit access to records in their possession and information assembled by their accountants to test the effect of the proposed schedule. It is therefore in the public interest that the Secretary conduct a further investigation in order that he may be fully and accurately advised as to the effect upon respondent's income, and the efficiency of the service rendered by them, of the rates and charges approved as just and reasonable by the Order.

(13) By reason of the foregoing, respondent requests and desires a re-hearing and re-investigation of the matters in said Order of Inquiry herein referred to and the opportunity to introduce further evidence in respect to the matters and things in this section of this motion referred to, in order that justice may be done herein and that the Schedule of Rates and Charges under inquiry may be approved in

amounts not less than those stated therein, as well as to form and structure, as just, reasonable, and non-discriminatory Schedule of Rates and Charges.

II

(14) The findings of fact contained in the Order overlook relevant and important evidence taken at the hearings consideration of which is absolutely essential to a fair determination of a just, reasonable, and non-discriminatory schedule of rates and charges.

Market Developed Under Higher Rates

(15) The findings of fact contain the statement that the
134 public Stockyards at Kansas City was established in 1871; that demand by the producers of livestock for the services of representatives to sell their livestock resulted in the establishment of market agencies and a Live Stock Exchange, but overlook the undisputed testimony showing that at the outset and through the years of greatest development of the market the rates and charges of market agencies were established on a unit basis determined in such a manner as to yield a gross revenue to such agencies approximately equal to 2% of the gross proceeds of livestock handled by them; that the gross revenue yield of the rates under inquiry, even at the extraordinarily low prices for livestock existing in the years 1931 and 1932, and despite the increased costs incident to greatly reduced headage per sale yield a total gross revenue of less than 2% of the gross proceeds of the sale of such livestock.

Rates Less Than Charges for Selling Other Agricultural Commodities—Work and Responsibility Greater

(16) The order fails to refer to or in any manner reflect in the conclusions therein contained the undisputed evidence showing that at all the times to which the evidence at the hearing related, the rates and charges of this respondent and other respondents under inquiry expressed in percentage of sales proceeds were less in amount than commissions charged in respect to the similar sale or handling of any other agricultural product despite the fact that the service on a unit basis, due to the variability in the grades and prices of the commodity handled and its perishable character, involves greater expenditure of time, money and effort per unit handled, and requires a higher degree of professional proficiency than in respect to any other of such compared commodities. The Order fails to give weight to the established practice of relating individual rates to the value of the product handled.

War-Time Rate Increases Insignificant

(17) The Order fails to refer to or reflect in its conclusions the undisputed evidence taken at the hearings showing that despite in-

creased costs during the War period from 1913 to 1919, the rates and charges of these agencies were increased by only 10% over the 1913 level, whereas increases occurred in cost of living, in farm wages, in general hourly wages, in livestock prices, in wholesaling and processing costs in respect to livestock and its products, in meat retailing costs, in transportation charges, in brokerage or commission charges on other agricultural commodities averaging approximately 200%. The Order also fails to refer to the fact that the rates and charges found to be reasonable are in many instances less than the prevailing charge for the rental or use of the pens in which the livestock sold is yarded.

Schedule In Force at Commencement of Proceedings Established By Secretary After Hearing Held During Low Price Period

135 (18) The finding of fact set forth in Paragraph 23 of said Order, referring to the Schedule of Rates and Charges, and in effect from and after January 1, 1926, fails to state, as shown by all the evidence, that said Schedule of Rates and Charges was formulated and approved by the Secretary of Agriculture after a hearing upon notice of inquiry, and this respondent ordered and directed to file same with such Secretary; that the rates and charges found by said Order to be unjust and unreasonable in amount were rates and charges under the Schedule filed May 11, 1932, accomplishing a substantial reduction in the gross revenues derived under the Schedule of Rates and Charges theretofore established by the Secretary and determined after hearing to be just, reasonable and non-discriminatory as applied to conditions much more favorable to respondent as to net operating income than those existing from 1929 to 1933. The year 1923 was used as a test period in the former order. In 1932 receipts of cattle and calves were 42.20% less, of hogs 56.85% less, and of sheep 9.9% more than in 1923.

Registration of Additional Agencies Accepted Under Act Regardless of Qualifications or Public Necessity

(19) The Order, in Paragraph 129 thereof, states that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle business at the Kansas City Stockyards properly, but fails to state that the records on file in the Secretary's office and offered in evidence disclose that the Secretary has registered as market agencies at the Kansas City Stockyards as competitors of this respondent registrants who had previously been expelled from membership in the Kansas City Live Stock Exchange for confessed misapplication and embezzlement of the proceeds of sales of livestock; and has compelled, through court proceedings, the said Exchange to extend to such registrants and other additional registrants not members of said Exchange all of the facilities of said Exchange, including the services of the Clearing House, participation in the blanket fire insurance policy main-

tained by the Exchange, and the hog dockage and inspection service operated by the Exchange. The Secretary not only established the rates first placed under inquiry, but has deprived the Exchange, under said Act, of the right, power, or authority to control or regulate the number of personnel of those engaged in business as market agencies at said stockyards.

Market Practice Agreement

(20) The fact that the Secretary, by and through his duly authorized representatives, assisted in the preparation and formulation of the Market Practice Agreement offered in evidence, and participates in the enforcement thereof, whereby there are approved and established rules in respect to the character and amount of solicitation and business-getting efforts and expenses similar in purport and effect as to non-members of the Exchange as those in effect under the rules of the Exchange as to member agencies such as this respondent, is not set out or referred to in said Order.

136 Private Stockyard Operation by Packers Increases Marketing Costs

(21) The Order, in Paragraph 50 thereof, states that the demand for livestock at Kansas City, particularly for hogs, is greater than the supply of livestock on the public market and sets forth the increasingly large number of hogs received by packers direct at their plants through private stockyard operation during the period from 1929 to August 1932, but fails to mention the fact that the undisputed evidence disclosed that such purchases of livestock were made upon the basis and through the use of market prices for livestock determined upon the public market at Kansas City by and through the efforts of this and others of the respondents. Despite the fact that the benefit of using prices established by the public market at Kansas City was available to such purchasers, they did not, and do not now, bear any portion of the burden of costs of maintaining the Kansas City market which fall upon this respondent and others at the market. Unfair competitive methods and practices are employed by packers in connection with the making of such purchases to the detriment of the producers of hogs. (Report of Committee on Agriculture, United States Senate, Exhibit 2.)

Preferential Railroad Rates Protect Unfair Competition at Railroad Stockyards

(22) The Order states that livestock tends to move from producer to consumers by the most economical route, and that freight rate structure or railroad transportation systems are the chief factors in delimiting trade territory (Paragraph 19). The Order fails to mention, however, the evidence in the record disclosing that in the early part of the year 1932 there were established differentials giving pref-

erential rates to railroad stockyards at Prospect, Missouri, and Morris, Kansas, within eight miles of the Kansas City Stock Yards, and at many other railroad stockyard or concentration points in said trade territory amounting to many times the total of all marketing costs or charges for stockyard services at the Kansas City Stock Yards. The market privilege of reconsignment in transit with change of ownership on through billing was taken away from the Kansas City Stock Yards but remains available at the competing railroad stockyards. The conclusions of the Secretary ignore and fail to reflect or give any weight whatsoever to this situation and to its future effect upon the volume of business to be transacted by this and other respondents at the said Kansas City Stock Yards or to the obstruction which such preferences create to the flow of commerce in livestock through said stockyards.

III

(23) The conclusions contained in the Order and expressed in the Schedule of Rates and Charges approved are predicated upon hypothetical standards of salesmanship performance not actually attained by this respondent or others of the respondents in the practical conduct and management of their respective businesses. Such standards of performance are not only contrary to all of the competent and credible evidence before the Secretary but would be manifestly impossible of attainment in the practical operation of the market without complete destruction of its present efficiency from the sellers' standpoint.

137 Salesmanship Standards Specified

(24) The Order in Paragraphs 142 and 143 states that it was reasonable to expect a salesman of cattle and calves to sell 29,000 head of cattle a year; a salesman of hogs to sell 85,000 head of hogs a year, and a salesman of sheep to sell 250,000 head of sheep a year. Each of such salesmen is presumed by the order in the subsequent formulation of costs to provide all of the services incidental but necessary to the selling operation customarily performed by these salesmen. Such services include the maintenance of contact with the owners of livestock prior to shipment; appraisal, in the country; supervision en route to market either while on pasture, in Flint Hills, in feed lots or at feeding stations; keeping informed as to the changing market conditions; sorting and grading the livestock after arrival; directing the attention of suitable buyers to the livestock; interviewing and consulting with the owners of live stock at the market or advising them of the results of the sale if away from the market; together with such other duties as are usually performed by competent and efficient salesmen.

These Standards Unattained in Actual Operation

(25) The evidence discloses that no individual salesman of this respondent or any other respondent agency or salesman at any other

public stockyards during the year 1931, or any other year, has reached or attained such a standard of performance and efficient salesmanship. The average number of head handled per salesman, either in the years 1929 or 1931, or any other year, of this respondent or of any other of the 60 respondents in this proceeding, is not shown by the evidence before the Secretary to have reached such a standard of performance or to have approached such standard.

Would Create Inefficiency and Destroy Market

(26) There were engaged in 1931, as shown by the evidence, in the actual selling of cattle and calves 84 owner salesmen and 104 employed salesmen, a total of 188 trained, experienced and competent men, who used all of their time in the performance of this function and in duties incidental thereto. These salesmen made 437,688 separate and distinct sales of cattle and calves totaling in number 2,284,207 head. If the conclusion reached in the Secretary's order was sound these salesmen should be reduced in number to a total of 78.77 men who would be required throughout the year to consummate sales of separate lots of cattle and calves, each of an average value of \$242.78, at the rate of 8.9 sales per actual selling hour. This statement assumes the fact shown to exist by the record that the market at Kansas City is practically a four day market and that each day has on an average three active selling hours. It further assumes a situation impossible of attainment in that it is based upon an absolutely even division of receipts among each and all of these salesmen. It ignores, likewise, the tremendous daily, weekly, and seasonal variation in the quantity of total receipts of cattle and calves. The effect of the Secretary's order would be to increase the amount of sales proceeds per salesman actually realized in 1931 from \$905.55 per hour to \$2,161.32 per hour. When the variability of the grade and quality of the livestock is carried in mind and the fact that these salesmen, unlike ordinary salesmen, determine the price to be asked for the commodity they sell, it is all the more manifest how unreasonable and impossible of consummation with efficiency is the standard set, and also how effective is the work now performed. Should the consummation of such a reduction in personnel be seriously attempted it is certain that a tremendous uproar, of protest would arise from those who patronize the market. If accomplished and receipts of cattle and calves continue to arrive at the market, the result would be a staggering loss to shippers amounting to many times the total of all market charges. This is disclosed in the evidence showing the effect on selling efficiency of the greater rapidity of sales incident to the disposition of drive-ins, a subject which has been heretofore mentioned.

(27) The evidence shows that cattle salesmen in 1931 actually consummated 3.73 sales involving 19.47 head per hour. In view of the increased number of drive-in consignments of reduced headage, the changes referred to in the Order in the custom of buyers, it is

submitted that the present standard of performance is all that can be reasonably expected without reduction of efficiency.

(23) In respect to hogs there were in 1931 15 owner salesmen and 35 employed salesmen, a total of 50 salesmen, who disposed of 1,045,048 hogs. Upon the assumption contained in the Secretary's order the number of these salesmen would be reduced to 12.3. Each salesman would be required to make 13.48 sales per hour, each of an average value of \$141.94. The actual number made in 1931 was 3.31 per active selling hour. The respondent whose records show the greatest rapidity of salesmanship in respect to hogs testified that on many occasions he had been unable to secure the most efficient salesmanship due to the over-crowding of work.

(29) There were engaged in 1931 in selling sheep four owners and eleven employes, a total of fifteen men. These salesmen sold 1,896,608 head, making 4.58 sales comprising 202.63 head per hour per salesman. Under the Secretary's Order the number of these salesmen would be reduced to 7.59, who would be required to make 9.05 sales per hour. The value per sale in 1931 was \$235.80. The average number of head per sale was 44.24. Under the Order each salesman would be required to sell 400.47 head per active selling hour. The record discloses extremes in the daily, weekly, and seasonal variation in receipts of sheep: Circumstances require close and careful examination of each sheep sold in many instances. The mere statement that the result of the standard makes this average requirement shows how impossible of attainment with retention of efficiency such a standard would be. Accomplishment of the result demanded would be completely destructive of the sheep market in Kansas City and would create such an obstruction to the current of commerce in respect to sheep to the Kansas City Stock Yards as in and of itself to constitute a violation of the provisions of the Packers and Stock Yards Act of 1921.

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IV

(30) The Order in failing to recognize as part of the reasonable cost of the operation of respondent's business the amounts actually expended in connection with the activities designated as "Business-Getting and Maintaining" by the Government accountants is clearly without supporting evidence, in conflict with the testimony of all witnesses at the hearings and constitutes unjustified invasion of the right of the respondent to manage and conduct its business.

Expense Classification Misinterpreted

(31) The Order, in dealing with the expenditures classified under the title "Business-Getting and Maintaining" by the Government accountant, has inadvertently misconstrued and misunderstood the character of expenses so classified and dealt with this classification upon the theory that it included only expenditures incidental to obtaining, through advertising or other forms of solicitation, new busi-

ness. As a matter of fact it included not only the expenses classified as "advertising" by the accountants but also all traveling expenditures such as expense incident to the operation of automobiles used in the business; all dues and assessments paid by market agencies for the support of the varied and essential activities of the Live Stock Exchange and also a proportionate part of the salaries of the salesmen representative of the time involved in appraising or supervising livestock en route to market. Under "advertising" was included as the major item of expense all circular market letters sent out by the respondents to inform shippers as to the condition of the market. It is evident from the Order that all of these expenditures were considered as comprising solely newspaper and magazine advertising and expense incident to the entertainment of prospective customers. The evidence shows conclusively that the total entertainment expense of all the 60 agencies sustained through the year was approximately \$3,000 and that the total amount actually spent for advertising by all the agencies was less than \$25,000.00. All of the witnesses testified that of the remainder of the expenditures so classified not less than 85% thereof were incurred as an essential part of the selling and buying operations on the market and in servicing of the livestock handled. It is therefore plainly evident that the Secretary through misinterpretation of the procedure followed by the accountants and the actual meaning of the term "Business Getting and Maintaining" descriptive of this classification, disallowed expenditures actually incurred by this and others of the respondents necessary and essential to sound and economical management and operation of their respective businesses.

Expenditures Now Disallowed Approved By Secretary When Incurred

(32) The evidence discloses that prior to the year 1929 there had been issued by the Secretary in Technical Bulletin 57 (Exhibit 18) of the Department of Agriculture, instructions and directions to those of the respondent market agencies doing business on the co-operative plan and in competition with this respondent for business at the Kansas City Stock Yards to engage in all of the activities in respect to advertising and getting business. This respondent is shown to have engaged in, and incur expenses incident thereto greater in amount and more varied in character than those actually incurred by respondent disallowed in whole or in part by the Secretary in this Order.

Expense Eliminations by Auditor

(33) The Order apparently overlooks the fact that the Government auditor in preparing the costs dealt with in the Order eliminated therefrom an item of \$3,432.09 expended by the respondents under the title "Charity and Donations," practically all of this expenditure be-

ing made in support of a community chest or general charity campaigns conducted by the Chambers of Commerce of Kansas City, Missouri, and Kansas City, Kansas. This elimination was improperly made inasmuch as it constituted a necessary obligation of this respondent and the other respondents as incidental to the maintenance of its business in said cities. There was also eliminated by the auditor and not considered by the Secretary an item of \$13,962.98 representing losses of the various respondents incident to the refusal of purchases by patrons of respondents. This constituted an expense incident to the business which should have been recognized as a part of the reasonable cost of operation.

Solicitation Cost Not Excessive

(34) All of the evidence of the hearings disclosed that the expenditures for advertising and other expenses incident to the solicitation of business were actually made by this and others of the respondents in good faith in the exercise of sound business judgment for proper purposes and were not excessive in amount or unnecessary in character.

Exchange Limitations on Solicitation

(35) All of the evidence before the Secretary shows that the respondent obeyed and conformed to rules of the Kansas City Live Stock Exchange restraining and limiting expenditures by respondent and other respondents, members of said Exchange, in the entertainment of shippers or buyers of livestock, in the use of telephone or telegraph facilities for the solicitation of business, in the expenditure of time away from the market, in using the radio for advertising purposes, and other activities normally incident to the solicitation of business.

Competitive Conditions Render Essential Increased Business-Getting Expenditures

(36) The Order shows upon its face although it does not recognize the necessity for greater instead of less business getting effort and expenditure on the part of this respondent and the other respondents. It is shown that marketings of livestock from territory tributary to the Kansas City market have been increasing in volume and percentage at Chicago and St. Louis where commission rates were much higher than those in effect at Kansas City. Governmental agencies have extended financial assistance to a cooperative marketing association at Kansas City, one of the respondents, in order to indirectly finance business-getting efforts of similar character by such association. Undisputed testimony discloses the intensity of efforts of packers to divert livestock from the public market to their private stock yards or concentration points. In order that the flow of livestock through the market be maintained in accordance with the purpose of the Packers and Stockyards Act it is essential that these

efforts and this competition be adequately met by counter effort and expenditure. The record clearly indicates the necessity for greater rather than less expenditure of time, effort, and money to attract receipts of livestock.

(37) There is no principle of business management more universally recognized today than that the industry or individual business enterprise which fails to adequately advertise the utility and value of its service or product will surely perish in the stress of modern competition. The correlative principle that lower, not higher, unit costs are secured by well-considered advertising programs and sound promotional work is equally well recognized.

Amount Allowed Wholly Inadequate

(38) The amount of expenses as above classified and recognized by the Secretary and covered into the rates established would be insufficient to pay traveling expenses actually incurred and would leave nothing for the support of the Exchange, for the sending out of market circulars and market information, for any form of advertising, for the operation of automobiles, or for the entertainment of patrons. It is earnestly and sincerely suggested that such a situation would not only mean the destruction of the business of this respondent but the elimination of the competitive livestock market at Kansas City and the discontinuance of the effective and essential public service which it has rendered or would in the future render to livestock producers in the territory tributary thereto.

V

(39) The failure of the Order to recognize as a part of the reasonable cost of operating the business of this respondent salaries actually paid to employed salesmen, and the appraised value of owner-salesman's services actually devoted to the business, is clearly without support in the evidence.

Wages of Employed Salesmen Already Non-Compensatory

(40) As a result of the over-powering compulsion of greatly reduced gross revenues received by employing marketing agencies, including this respondent, the salaries of all employes, as set out in said report, were non-compensatory for the services rendered even in 1929 and during the period prior thereto. The rates and charges collected by the respondents neither during the world war nor during the period of recovery subsequent to 1921 followed the general increases in the cost of other services and commodities.

Hence salaries remained at relatively low levels. The reductions subsequent to 1929 in gross revenues further reduced compensations paid. Increased drive-in business, multiplying consignments, and necessary operations in respect thereto required

more work and additional personnel without corresponding increase in revenues.

Qualifications of Witnesses Testifying as to Value of Owner-Workers' Services not Recognized

(41) The Order, in Paragraph 135, states that the witnesses who testified as to the actual value, in their opinion and judgment, of the owner-worker's services in connection with the rendition of stockyard services during the year 1931 possessed no peculiar qualifications authorizing their expression of expert opinion or judgment upon this subject, but the Order fails to state who these witnesses were and that each and all of them were men particularly qualified by acquaintanceship with the practical conduct of the business, with the men whose services were being appraised, by personal business experience either upon the market as buyers of livestock or as bankers financing livestock transactions, or as producers of livestock sold upon the market to evaluate the services appraised. In discarding their testimony and fixing a flat amount of \$4,000.00 per year as representative of the value of the services of these owner-salesmen, as well as of employed salesmen, the Order ignores not only all the testimony in the record showing that no two salesmen, either owners or employees, were alike in ability, capacity, or energy, but also knowledge common to all, that no two individuals are alike in ability in any given line of endeavor.

Method Employed Unsound

(42) It is apparent that the standard compensation fixed by the order for salesmen is very little in recess of the average fixed by the appraisers as to owner-workers. This result does not establish the soundness of the method employed. Before the last hearing respondent requested the Secretary to join in the selection of witnesses competent to appraise owner-workers services. The Secretary refused. The Order incorrectly and unfairly states that the witnesses who testified on this subject were not particularly qualified to express opinions and judgment on these values. This is manifestly in the light of the record an erroneous statement and constitutes an unfair reflection upon the qualifications, capacity, experience, and fairness of the witnesses, who were each and all of them men of outstanding ability, integrity, and possessed of experience and knowledge particularly qualifying them to give expert testimony upon this subject. The Order should frankly recognize these qualifications. In the so-called Omaha case to which the Order referred as justification for the method employed the respondents presented no evidence whatsoever of this character, and in fact, as the Supreme Court of the United States said in its opinion, presented little or no evidence of any description.

Personnel Required

(43) The conclusions reached in the order in respect to increase or decrease in the number of workers employed in rendering stockyard services furnished by respondents overlooks the findings of fact contained in the prior sections of the order (Paragraphs 25 & 28). These findings based on the evidence show the necessity for a very great increase in the number of men required to render efficiently these stockyard services on account of the great reductions per consignment and per sale, which, as the findings state, has given to respondent's business "the aspects of the retail handling of a commodity" instead of a wholesale handling, and has brought about increased cost per head of live stock handled.

Salaries Reduced

(44) The Order states (paragraph 113) "The general impression gained from the record is, however, that respondents, in the face of almost universal lower levels in the United States, are attempting to maintain their personnel and the salaries thereof at the levels obtaining in the more prosperous year, 1929. This necessarily has a depressing effect upon the net moneys available to the owners of these businesses which may be designated 'net owner incomes.'" It will be recalled during 1931 the then President of the United States made public appeals to employers in general to maintain wage scales. The statement as made in the Order is, however, incorrect. The cost study made by the government's chief accountant shows that the average wage of non-owner employes handling cattle and calves was \$3,957.00 in 1929 and \$2,809.00 in 1931. Employes engaged in handling hogs received an average wage of \$2,644.00 in 1929 and only \$2,122.00 in 1931. Employes engaged in handling sheep received an average wage of \$3,513.00 in 1929 and only \$3,029.00 in 1931. The comparative reductions in average owner compensation included in the Government audits as between the two years were greatly in excess of the reductions in respect to compensation of employes.

VI

(45) The Order fails to recognize and include in the reasonable cost of the operation of the respondent's business a fair return upon the capital necessary and essential to such operation.

Capital Invested

(46) The audits made by government accountants of the business of these respondents disclose net worth as of January 1, 1931, amounting to \$1,010,145.11, and as of December 31, 1931, a net worth of \$824,408.92; the general average of such net worth throughout the year amounting to the sum of \$917,277.00. In addition the account-

ants recognize but fail to consider in assembling their costs, expenditures actually made for interest on exchange in collection by respondents amounting during the year to \$18,796.51.

Interest Return

(47) The Order held that a rate return of 6% on fixed capital and 7% on working capital was reasonable. In so holding the Order is in conflict with the testimony of many witnesses, including experienced bankers and others to the effect that rates in excess of 8% per annum were reasonable and would be required to induce the investment of capital in the business of a market agency under the conditions existing in 1931 with respect to the business of this respondent.

Amount Recognized Insufficient

(48) The Secretary allowed a return on invested capital of only \$54,486.04 for the year 1931. This respondent and the other respondents in accordance with their respective use and employment of capital were lawfully entitled to a return of not less than \$73,382.16 upon capital of their own used and useful in their respective businesses, and in addition the sum of \$18,796.51, representing expenditures for the use of borrowed capital, or a total of \$92,178.67. The Order therefore denies this respondent a fair return upon the capital employed by it, useful and necessary to the stockyard services rendered, and in so doing takes the property of this respondent without due process of law and in violation of the fifth amendment to the Constitution of the United States.

Financial Responsibility Required

(49) The Order recites, in Paragraph 80 thereof, that this respondent and other respondents have filed with the Secretary what is denominated by the Order as a "Remittance Bond" to guarantee the faithful remittance of the proceeds of sales of livestock by respondents to the owners of such livestock, but fails to state that the form of bond given by this respondent and other respondents is not that of a mere fidelity or remittance bond, but is that of a contract bond, not only guaranteeing the faithful remittance of proceeds received for livestock sold, but guaranteeing prompt payment for all livestock purchased. The conclusion appears in said paragraph that the maintenance of said bonds, aggregating in excess of \$1,200,000.00 in penalty amount, necessitates but "a small amount of capital." In reaching such a conclusion upon the facts disclosed by this record, the Order violates all well-recognized and established principles of sound suretyship and underwriting and is not in accordance with fact, and denies to this respondent a fair return upon part of the capital necessarily employed in the conduct of its business. Such

conclusion is directly at variance with an order of the Farm Credit Administration issued at Washington, D. C., on June 13, 1933, to the effect that livestock should only be consigned to market agencies of recognized "facilities, experience and financial responsibility."

Going Concern Value Eliminated

(50) The Order fails to give cognizance to evidence in the record as to the cost of the establishment in the business of this respondent, as well as other respondents, of the routines, methods and practices necessary to create a going business as a market agency, and fails to include as any part of the capital of this respondent upon which a return is allowed by said Order, any item or element reflecting
145 such cost or representative in whole or in part of going concern value. The Order attempts to interpret the evidence submitted by petitioner as being representative of the cost of acquainting employees with the methods, practices and routines essential and useful in the transaction of the business of this respondent, whereas the value so claimed by respondent as a part of its capital was, as the testimony shows, representative of the cost of establishing and coordinating in a going business these routines, methods and practices essential to successful operation, and setting to their respective tasks personnel having individual knowledge thereof.

VII

Rates to Dealers

(51) The rates and charges set out in said Order are not classified as between "dealers," as defined in said Act, and others for whom livestock is bought and sold. In so placing rates and charges to be paid by dealers on the same basis as rates and charges collected from others, the Order invades the power and right of management by this respondent of its own business and sets up rates and charges which would be, in fact, as shown by all the evidence in the record, uncollectible in the amounts so provided, create a duplication of commission charges with respect to the same livestock, and violate the long-established custom and practice of this respondent and of the other respondents in that rates and charges to "dealers" have been approximately 50% in amount of those charged others not registered as "dealers" under the Act. The Secretary, in determining that the rates and charges provided in said Order would yield a fair return to this petitioner, improperly and erroneously evaluated the return so to be received on the basis of the ability of this respondent to apply the same in the future conduct of its business. As shown by all the evidence in the record, this respondent will be unable to apply such Schedule of Rates to sales made on behalf of such "dealers" and will, in fact, fail to realize in respect to such sales the greater revenue therefrom anticipated by the Order of the

Secretary. Therefore, the gross return yield of the Schedule of Rates and Charges provided for in said Order will inevitably be less than the amount of such yield as contemplated by the Order, and fail to offer to or provide for this petitioner a fair return for the actual expenditure of time, effort, and money in the rendition of the stock yard services to which such rates and charges are applied.

VIII

Hazards Not Evaluated

(52) The Secretary failed to give recognition, as a necessary and reasonable operating cost to this petitioner, to certain of the hazards encountered in the transaction of petitioner's business as shown by all of the testimony, and such allowance as is made in said Order as representative of reasonable cost to this petitioner of uninsurable hazards is predicated solely on speculation and guess, and is not fairly representative of expenses normally incident to the existence of such hazards, such hazards originate from the liability of petitioner incident to loss of livestock in custody, damage done to others through escape of livestock in custody, loss incidental to failure of purchasers to pay for livestock purchased, loss uncovered by insurance incident to the guaranty of title by petitioner to the purchase covering livestock sold by petitioner, and loss, incidental expense, and errors entering into accounting processes, and loss incident to bank failures affecting the transmission of proceeds and collection of payment items. The allowance made in Paragraph 163 of said Order to cover uninsurable risks of the character above enumerated was \$.0035 per head for cattle and calves, \$.0014 per head for hogs, and \$.0004 per head for sheep, and is wholly and entirely inadequate to cover such insurable risks and is not based upon evidence in the record, but solely upon a conclusion arbitrarily arrived at without fair consideration of such evidence.

IX

Allowance for Profit

(53) The statement contained in Paragraph 159 of said Order, to the effect that reasonable rates should provide also a per head profit, that is, compensation for management and the carrying of uninsurable risk, is based upon an erroneous conception of law in that fair compensation for management and expenses incident to carrying uninsurable risks does not constitute profit but is expense. The Order, in purporting to allow in the ascertainment of reasonable per head cost for reasonable profits or margin of profit in respect to selling or buying each species of livestock, and yet failing so to do, is inconsistent and erroneous.

X

Management Expense Understated

(54) The allowance set up in order to ascertain reasonable costs per head in Paragraphs 159 to 163, inclusive, of said Order, to cover compensation for management, is erroneously and improperly arrived at in that the bases stated therefor in Paragraph 159 is the ascertained cost of management of the two co-operative respondent market agencies. Such costs are not comparable under the evidence with the necessary cost incident to the management of respondent's business by reason of the fact that the amounts so stated relate to conditions and expenses of management dissimilar and non-comparable with those sustained by this petitioner. The evidence shows that such co-operative associations are managed by their several Boards of Directors, no allowance for whose time and expenditures is included in the amounts set out, and receive assistance from public employees in connection with matters affecting management, including employees of the Department of Agriculture, both in and out of Washington, D. C., county agents, and others the expense of which is not included in the amount stated.

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XI

Buying Rates

(55) The Schedule of Rates and Charges approved by the Order contains the statement that the rates for buying live stock of the various species should not be in excess of those for selling like species. The effect of this provision of the Tariff on revenue is not ascertained by the Order. As a matter of fact the application of the selling schedules contained in the order to buying operations would increase buying rates by approximately $33\frac{1}{3}\%$ over the rates now in effect under the schedule filed by this respondent.

Increases Unjustified

(56) The Order devotes four short paragraphs on Page 80 to a discussion of buying costs. These paragraphs contain statements manifestly incorrect and unsound. The statement is made that the costs for buying are the same in amount as shown for selling except as to the items for salesmanship and for interest. (Paragraph 165.) It is common knowledge and undisputed that the buying operation does not involve the physical control of livestock to the same extent as does the selling operation. The relatively greater difficulty of the selling is evidenced by the fact that many buyers, including farmers, employ no agency to represent them. This is seldom the case in selling livestock. The selling agent must grade and sort the livestock and care for it from the time it is unloaded from car

or truck until it passes over the scales. He must supervise it while en route to market. Live stock bought is delivered to the buyer at the scales and the employes of the stockyards company place the live stock in the pens of the buyer or see to the loading out under his supervision. In selling this work is done by the commission firms. It is axiomatic that to sell is more difficult than to buy—when you have the purchase price. The Order states in Paragraph 166 that a competent buyer can buy as many animals of a species as an equally competent salesman can sell. While there is no direct testimony upon this point in the record the statement made is unsound only in understating the proposition. A competent buyer can undoubtedly buy accurately and efficiently with much greater rapidity than a salesman can sell. The buying costs as reflected by the cost study of respondent's account in respect to cattle and calves were \$.4259 per head; in respect to hogs, \$.0955 per head; and in respect to sheep \$.0401 per head. This cost as to cattle is approximately two-thirds the selling cost; as to hogs approximately one-fourth of the selling cost; and as to sheep approximately 45% of the selling cost. It is true that capital requirements in buying are greater, and that losses from refused purchases sometimes occur, but these items constitute a small part of total costs either in selling or buying. The Order ignores this cost differential. It makes no reference to the testimony of many witnesses to the effect that it was the well established policy of the market to employ every possible means of securing the competition of additional buyers at the market in the interest of those who consign their livestock to the market for sale.

148 Increases in Buying Rates Not Realizable Without Injury to Market

(57) The increased buying rates allowed by the Order are merely "paper" rates so far as yielding additional revenue to this respondent is concerned. The record shows that over a long period of time the current buying rates have been in effect and have borne a well established relationship to selling rates.

Chicago Buying Rates Lower

(58) It appears that although selling rates are much lower at Kansas City, buying charges are already higher at Kansas City than at Chicago. The rates provided for in this Order, if appealed, would create the anomalous condition of selling rates approximately 40% less than those in effect at Chicago, and buying rates approximately 40% higher than those at Chicago. Such a rate adjustment overturning a relationship between selling and buying rates that has existed not only at Kansas City but upon other markets for many years, would tend to obstruct the flow of livestock through the Kansas City Stock Yards which the Act seeks to protect and increase, and would be discriminatory and prejudicial.

Antagonistic To Sellers' Interests

(59) The principle of rate-making embodied in this section of the Order, unjustified as it is from the standpoint of relative costs, impossible of effective application on account of competitive conditions, proceeds in defiance of sound and well-settled marketing policies and in direct antagonism to the true interests of producers of livestock.

Unit Cost Integrations Contained in Order Are Inaccurate and Inconsistent with Sound Cost-Finding Principles

(60) The Order, in fixing the alleged reasonable costs per head for selling and buying, not only ignored and refused to give weight or effect to the costs found and testified to by the respondent's accountant, but also ignored and refused to give weight or effect to the unit costs found to exist by the government's chief accountant. That is evident from the comparative unit-costs shown in the table below:

Species	Gov't chief accountant	Respondent's accountant	Fixed in the order
Cattle and Calves, per head.....	56.71c	61.64c	44.79c
Hogs, per head.....	25.10c	33.87c	18.10c
Sheep, per head.....	08.02c	08.83c	05.80c

(61) The differences in the findings of the respective accountants is largely attributable to the difference in treatment and allowance for compensation of owner-workers' services, and may be wholly reconciled and explained. The unit costs fixed in the Order, however, have no traceable connection with the findings of the accountants which were so laboriously and expensively arrived at, and rest solely on speculation and guess-work and imported considerations which are altogether apart and foreign to the record in this case. The findings of the accountants reflect the history of the actual experience of the firms insofar as it is recorded, as determined by audits made by government forces. With respect to the sacrifice value of the personal services rendered by the owner-workers the facts are not of record. The government accountant used in lieu thereof the drawing accounts, the profit-takings, or some other indication (and in cases allowed nothing at all) to represent such owners' compensation, while the respondent's accountant used the independent witnesses' appraisalment of the fair worth of their services. The Order, however, gives no effect to and disregards the evidence of record in this and other particulars and sets up function unit-costs, allegedly reasonable, but which in no instance have a counterpart in the actual experience of any of the 61 firms operating on the Kansas City market. These theoretical and imaginary unit-costs fixed by the Order, when applied to the 1931 volume of all firms save the two co-

operatives, produce an aggregate suppositious handling cost, including return on investment, etc., which is \$856,737, or 44.4% less than the aggregate costs and charges found by the respondent's accountant, and \$633,132, or 37.11% less than the aggregate expenses found by the government's chief accountant, whose figures include nothing for return on invested capital or for profit allowance. These markedly unusual and unwarranted differences reflected by the service costs and charges conceived and set forth in the order are clearly traceable to violence done to the well established and universally accepted principles of cost-finding, and to the recognition of considerations wholly foreign to the record. By denying the true incidence of the cost of owner and employee workers' time devoted to yarding service, deleting the same from the unit-costs fixed for that function on the ground that it is covered by the allowance for selling-buying service, the truly reasonable costs of the yarding function have been grossly understated. When fixing the unit allowance for the selling-buying function, the actual expenses have been ignored entirely, an arbitrary limit being observed in fixing the unit-cost of that function. By this process the Order fails to make adequate allowance anywhere for the actual costs of yarding performed by workers whose expense was joint as between selling-buying and yarding functions. An hypothetical treatment of so-called business getting and maintenance expenses, and a wholly mistaken conception of its true character and legitimacy, has resulted in an arbitrary allowance expressed in a unit cost which is based solely on opinion and in complete disregard of the facts of record.

(62) Species costs, as found by the accountants, segregate themselves with a fair degree of accuracy. The functional costs within the species costs, however, do not segregate themselves in actual operations, the same personnel and the same facilities being used very largely to perform all the functions. Species functional costs are therefore difficult to arrive at and impossible of reasonably accurate determination. They can be found only with the aid of arbitrary bases of apportionment, the most appropriate of which may actually vary widely from the facts. Erroneous conclusions reached in this order are occasioned chiefly, perhaps, by the procedure of disintegrating the species costs and reintegrating the allowed head rate by combining modified species functional costs. Under this procedure hypothesis rests upon hypothesis, and conjecture is piled upon conjecture, to the end that the final result reached bears no resemblance whatever to the facts in the situation. The process employed serves to bring about an unintentional magnification of errors, no doubt substantial but of unknown degree, which are inherent in the original functional cost separations.

(63) Another penalty is unintentionally inflicted upon those whose livelihood depends upon the fairness of the rates being fixed, as a result of the integrating process employed under the conditions referred to. After making arbitrary eliminations and reductions in the costs as heretofore mentioned, the pared down functional costs are

them considered separately, and neither the total species costs, nor the total operating costs are allowed to influence the integrated species unit costs stated in the Order. Notwithstanding, however, the market is a concrete whole, and each individual agency is obliged to handle all different kinds and sizes of consignments which may be offered, and to operate as an independent unit. For example, selling costs are found to be unusually low in the case of agencies which have relatively high unit costs for "business getting and maintenance." But when functional costs are considered separately, the connection between a low selling cost and a relatively high business getting cost is lost sight of, and cannot and has not received consideration. Neither the agencies handling average volume, nor any other agency, finds its functional costs within the range of the unit costs denominated as reasonable in the Order. Nor do the unit total costs of any one agency come within the limits of the unit total costs stated in the Order as reasonable.

(64) The disparities and discrepancies so conspicuously present in this instance are the common and almost inevitable results of pursuing a method of fabricating so-called unit costs out of computations which relate, not to the actualities and the practical aspects of the situation, but to conjecture erected upon conjecture. The method pursued strains for refinements and nice exactions and differentiations which are impossible of attainment if the facts alone be dealt with.

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XIII

Confiscatory Effect of the Rates Prescribed

(65) The rates prescribed by the Order are confiscatory, discriminatory, prejudicial, and unlawful. The fact that they are confiscatory is plainly evidenced by the government's findings as to operating costs, which do not reflect all of the expense which respondent claims attaches to its operations.

(66) In the case of the eleven agencies referred to at page 39 of the Order as having handled more than fifty percent of the total market volume in 1931, an application of the prescribed rates to the transactions actually handled by such agencies throughout the year discloses that the revenue yield of such rates would be only \$7,920.37 more than the actual and admitted costs of providing the service exclusive of any allowance whatever for personal services rendered by the owners, exclusive of any return whatsoever upon the invested capital, exclusive of any allowances whatsoever for bad debts, for losses resulting from refused purchases, and for reserves to protect the uninsurable hazards to which the businesses are constantly subjected.

(67) In the case of cattle and calves, the rates would only return the bare operating expenses found by the government's chief accountant exclusive of the items aforementioned, plus \$6,391.21. In the case of swine, the rate would yield \$980.94 less than the bare operat-

ing expenses so found. In the case of sheep, the rates would yield only \$2,510.10 more than the bare operating expenses so found. The net yield of \$7,920.37 from all species over bare expenses would lack \$20,640.28 of meeting the order's allowance for return on investment and would allow nothing whatsoever for compensating the owners for their personal services.

(68) The eleven agencies referred to are Agency Numbers 73, 51, 84, 82, 83, 36, 46, 10, 63, 59, and 54, being the eleven out of sixty-one agencies operating on the market which enjoyed the largest patronage. Collectively they handled 49.96% of all cattle and calves, 59.42% of the swine, and 56.44% of the sheep sold and bought as represented by the number of head, and 54.32% of the total number of equivalent carloads, the unit of measurement used in the Order. Among the eleven are the two co-operative agencies, numbers 10 and 36.

(69) The eleven agencies to point are those of large volume, being of the class, according to the statement in the Order appearing on page 53, whose cost experience may not be taken as criteria for rate-making purposes lest injustice be done to other firms handling volume of lesser magnitude, and, therefore, at higher unit costs.

(70) In the case of these eleven agencies, the gross yield of the prescribed rates is less than one per cent more than the bare operating expenses found by the government's accountant, exclusive of 152 the items aforementioned. If we reckon the allowance deleted from the government expenses for owners' services, amounting to \$147,162.80, and return on investment on the basis of the order's allowance, which aggregates \$28,560.65 for the eleven agencies, the degree in which the rates are manifestly and undisputably confiscatory may be set at the sum of these two items less the \$7,920.37 returned in excess of bare operating expenses, or \$167,803.08 for the eleven firms. This sum is 17.3% of the government's own findings as to what the rates should cover.

(71) Taking the twenty-three agencies, inclusive of the eleven just referred to, which are cited in the Order at page 39 as having handled more than 75% of the market volume as measured by equivalent carloads, it likewise appears by applying the prescribed rates to the transactions actually handled throughout the year 1931 that such rates are confiscatory as applied to such firms individually and collectively. These particular twenty-three of the sixty-one agencies operating on the market are those which individually handle the largest volume and unquestionably operate with more than the average efficiency and economy of expenditures. Collectively such agencies handled 76.55% of all cattle and calves, 77.14% of all swine, 60.24% of all sheep, and 70.99% of all animals sold and bought on the market during 1931, as measured by the number of head, and 75.3% of the total volume of all species as measured by the equivalent carload.

(72) Again using the operating expenses found by the government's chief accountant as they appear of record, which are exclusive

of any return whatever upon invested capital, and deleting therefrom the amounts included to represent compensation for owner's services rendered, the gross revenue produced by the prescribed rates would be only \$25,025.38 more than the government's findings as to bare operating expenses of such twenty-three agencies. This \$25,025.38 is only 60% of the allowed return on the investment of such firms, thus providing no compensation whatsoever for owners' services rendered. As shown by the government's own evidence of record, the measure of confiscation as respects these twenty-three firms is indicated by the sum of the allowances for owner's services, as shown by its chief accountant, and the return on investment allowed in the order, less the \$25,025.38 which the rate yield would contribute thereto, or \$269,565.02. This deficiency is 18.7% of the total operating expenses found by the government's chief accountant plus the allowance for return on investment provided by the Order, as respects the twenty-three agencies.

(73) Considering the fifty-nine firms operating on the market, exclusive of the two co-operative agencies, the yield of the prescribed rates over bare operating expenses, exclusive of any compensation whatsoever to owners for services rendered, and exclusive of any return whatsoever on capital invested, would be \$115,253.87. For such firms the allowance for return on investment provided in the Order would be \$49,073.64. Deducting that amount from the \$115,253.87 referred to would leave \$66,180.23 to compensate the owners for their services, which would average \$486.62 per owner per annum.

153 (74) Considering the two co-operative agencies, and reckoning the yield of the prescribed rates on the basis of the average yield per head for each species, as developed by applying the prescribed rates to the actual transactions of the fifty-nine firms for the entire year 1931, the showing for the market as a whole is further impoverished. On that basis, the rates would produce \$78,125.09 over the government's findings as to bare operating expenses. After providing for return on investment as allowed in the order, in the aggregate sum of \$54,394.81, the remainder of the rate yield available for the compensation of owner-workers would be only \$23,730.28, an average of \$174.50 per owner-worker per annum, or the equivalent of 48 cents per man per day.

(75) Based upon the government's own findings as to the actual and admitted expense and cost of operations, exclusive of any allowance whatsoever for owners' services, and exclusive of any return whatsoever on capital invested and used in the conduct of the business, the prescribed rates are confiscatory, discriminatory, prejudicial, and unlawful as they would apply to this respondent. This is proven to be so by applying such rates to each and all of the transactions actually handled by this respondent during the year 1931. The net sum, if any, which would remain after defraying the bare operating expenses for that year (as disclosed by the government's audit and set forth in the exhibits of record, introduced by its chief accountant)

to provide the Order's allowance for return on invested capital, and to compensate the owner-workers for their personal services rendered, is shown on the underscored line of the table next following, together with the amount of the Order's allowance for return on invested capital, the residue thereafter available for the compensation of the owner(s), and the average compensation per owner, if any, per annum which such amount represents. The amount (if any) so appearing as compensation available to the owner(s) is in fact exaggerated, because the actual expense and cost of conducting the business of the respondent in 1931 was materially in excess of the findings of the government's accountant, as shown by the testimony and exhibits of the respondent's own accountant witness. The government's own findings as to operating expenses and the cost worth of owner-worker's services is used here without prejudice and without any abatement of respondent's contention as to their inadequacy and unfairness, because their use removes all occasion for dispute concerning the amount of deductions from the gross yield of the prescribed rates, and resolves all contentions with respect thereto to the disadvantage of the respondent.

154 REVENUE PRODUCT OF PRESCRIBED RATES WHICH WOULD BE AVAILABLE FOR COMPENSATION OF OWNERS FOR SERVICES RENDERED, AND FOR RETURN ON CAPITAL INVESTED

[Deficits appear in italics]

Agency No.	Revenue from rates available to compensate owner for services and return on investment	Less return on investment as allowed in the order	Remainder, if any, available to compensate owner for services rendered	Average compensation available per owner per annum
1.	\$716.02	\$173.10	\$542.92	\$542.92
4.	3,387.80	610.89	None	None
5.	1,103.12	863.33	356.79	356.79
6.	3,285.62	299.68	2,985.94	1,492.97
7.	4,331.33	529.66	3,801.67	1,900.84
9.	285.78	182.45	None	None
11.	1,468.74	42.50	None	None
12.	11,140.65	1,229.86	None	None
13.	1,352.72	1,267.60	85.12	28.37
14.	684.70	855.57	None	None
15.	4,451.21	385.36	4,065.85	2,032.93
16.	4,989.58	465.87	4,523.71	1,507.90
17.	3,360.76	221.16	3,139.60	1,579.80
18.	9,945.47	980.81	8,964.65	2,241.16
19.	1,899.83	226.04	None	None
20.	1,870.98	514.38	None	None
23.	1,044.34	538.33	506.01	506.01
25.	1,658.65	948.79	None	None
26.	879.79	607.90	271.89	135.90
29.	657.74	474.98	82.76	27.59
30.	2,850.25	378.09	2,472.16	1,236.08
33.	441.11	37.23	403.88	403.88
34.	2,462.63	898.31	1,564.32	1,564.32
35.	45.64	1,185.13	None	None
37.	435.86	23.36	402.50	402.50
42.	7,406.58	1,028.39	6,308.19	2,102.72
43.	3,422.31	561.92	2,860.39	2,860.39
44.	9,564.85	1,069.54	8,495.29	4,247.65
46.	8,247.90	2,626.98	5,620.92	1,124.18
48.	6,874.05	678.76	6,195.29	2,065.10
51.	12,575.26	1,479.48	11,095.78	11,095.78
52.	19.06	386.12	None	None
53.	2,681.73	517.45	2,164.08	1,082.04
54.	3,359.54	5,308.63	None	None
55.	5,525.08	1,060.02	4,445.06	2,222.53

REVENUE PRODUCT OF PRESCRIBED RATES WHICH WOULD BE AVAILABLE FOR COMPENSATION OF OWNERS FOR SERVICES RENDERED, AND FOR RETURN ON CAPITAL INVESTED—Continued

Agency No.	Revenue from rates available to compensate owner for services and return on investment	Less return on investment as allowed in the order	Remainder, if any, available to compensate owner for services rendered	Average compensation available per owner per annum
56.	\$5,769.37	\$357.91	\$5,411.46	\$2,590.73
59.	1,111.55	3,788.54	None	None
60.	4,194.96	439.23	3,745.13	624.19
61.	615.45	232.67	382.78	382.78
62.	686.38	596.01	None	None
63.	2,419.08	3,159.28	None	None
65.	1,698.65	666.62	None	None
66.	1,031.31	61.13	970.18	970.18
67.	1,328.11	51.23	1,276.88	1,276.88
70.	1,694.28	699.94	None	None
71.	2,698.37	1,078.49	None	None
72.	268.69	43.68	225.01	225.01
73.	4,739.11	1,432.30	None	None
74.	258.18	149.13	None	None
75.	620.24	422.59	None	None
76.	1,654.37	210.90	1,443.47	1,443.47
77.	3,736.97	429.22	3,307.75	1,102.68
78.	770.78	209.19	None	None
79.	915.22	200.27	714.95	714.95
82.	1,976.60	1,875.71	101.09	20.22
83.	22,273.40	1,869.68	20,403.72	4,080.74
84.	4,543.81	1,608.88	2,944.93	948.31
87.	2,054.46	465.56	1,648.90	1,648.90
88.	468.50	45.20	None	None

The failure to grant the request of this respondent for a separate hearing upon the issues presented by the Order of Inquiry; the refusal of the request made to the Examiner that a tentative report on the evidence be prepared by the Examiner and that oral argument before the Secretary of Agriculture be had upon the evidence and the conclusions expressed in such report and the delegation to others of powers and authorities involving the exercise of discretion solely vested in the Secretary of Agriculture under the law, have served to deny to this respondent the full hearing to which respondent is entitled, provided for in the Packers and Stockyards Act, 1921, and as required under such circumstances by the laws and Constitution of the United States of America.

Wherefore, this respondent respectfully prays that an order be entered herein withdrawing and for naught holding said Order purporting to be made by the Secretary of Agriculture as of June 14, 1933, and re-opening the above entitled proceeding by re-investigation of the matters and things in the Notice and Order of Inquiry referred to, and that this proceeding be set down for further hearing in order that a proper determination may be had after full, fair, and adequate hearings and upon the evidence of the matters and things in said Notice and Order of Inquiry brought in issue.

FRED O. MORGAN COMMISSION COMPANY,

By JOHN B. GAG, Attorney.

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UNITED STATES VS. F. O. MORGAN

Comparisons of Unit-Costs per Order of June 14, 1933, and Total Costs as Found by Government Accountants and as Claimed by Respondents (59 Firms) For the Test Year 1931

Selling & buying No. of head 59 firms	Allowances per order June 1933		Total costs as claimed		Order's allowances in excess (excesses shown*)		Differences between Gov't and resp's costs (Gov't excess*)
	Rate per head	Amount	By Government Exhibit	Respondents	Of Gov't costs	Of Resp's costs	
Cattle & Calves: Salesmanship & Buying Yarding Salaries Yarding Expenses Office Salaries Office Expenses Business Getting & Mice Adm & Genl Expenses Insurance (Risk Expense) Return on Investment	2,284,297	\$214,992.15 171,315.53 31,978.90 119,920.87 68,526.61 102,789.32 75,378.83 15,589.45 34,283.11	\$351,248.83 221,737.54 29,299.39 136,767.01 71,533.40 326,303.91 75,366.43 30,433.98 29,730.01	\$410,161.43 236,083.76 29,349.00 126,222.46 74,004.24 296,248.94 81,373.82 24,010.06 44,482.54	\$36,256.68 50,422.01 *2,700.51 16,846.14 3,006.49 223,514.59 *12.40 14,444.53 *7,533.10	\$95,169.28 64,768.23 *2,629.90 6,311.59 2,471.54 193,459.62 8,094.99 10,189.43 17,722.53	\$58,912.60 14,346.22 79.61 *10,534.55 2,471.54 *30,054.97 0,007.39 *6,423.92 17,722.53
		\$935,154.77 59,947.25 *7,994.72	\$1,290,390.20 54,082.62	\$1,321,943.25 86,160.47	\$334,235.43 *25,804.83 *7,994.72	\$380,761.88 6,213.22 *7,994.72	\$52,526.05 32,077.85 *
		\$1,023,096.74	\$1,323,472.82	\$1,408,076.72	\$500,376.95	\$584,980.38	\$84,603.90
	1,045,048	\$26,890.19 31,351.44 6,276.28 31,351.44 18,288.34 18,810.86 20,990.96 2,612.62 7,315.34	\$56,021.73 62,975.60 2,274.92 36,958.26 19,426.59 52,043.54 18,800.21 5,508.06 5,707.31	\$63,547.69 65,297.42 2,247.49 41,332.72 26,110.38 101,098.13 19,240.80 4,971.47 10,444.59	\$10,731.51 31,024.16 *3,995.37 5,606.82 1,138.25 33,232.68 *2,100.75 2,895.43 *1,608.08	\$25,657.50 33,945.98 *27.43 9,981.28 7,822.04 82,197.27 *1,600.10 2,358.95 3,129.25	\$0,925.96 2,321.82 *27.43 4,374.46 6,083.79 48,994.59 *1,440.65 *536.39 4,737.26
		\$173,791.48 13,899.14 1,463.07	\$260,310.22 9,121.51	\$264,200.75 19,777.10	\$96,524.74 *4,777.63 *1,463.07	\$100,400.27 5,877.96 *1,463.07	\$73,884.53 10,655.59 *
		\$180,133.69	\$260,437.73	\$383,977.85	\$80,284.04	\$164,824.16	\$84,540.12
Hogs: Salesmanship & Buying Yarding Salaries Yarding Expenses Office Salaries Office Expenses Business Getting & Mice Adm & Genl Expenses Insurance (Risk Expense) Return on Investment		1665 0133 0014					
Total "Costs" Profit Management Uninsurable Risks							
Total Cost + Profit							

Sheet:	1, 899, 008	\$0. 0140	\$26, 552.51	\$28, 109.12	\$53, 323.47	*433.3, 99	\$6, 770.96	\$7, 124.05
Salesmanship & Buying			15, 172.86	14, 765.06	13, 171.40	*407.20	228.54	*52.18
Varying Salaries		0080	758.64	8, 726.11	8, 673.93	7, 967.47	7, 915.20	8, 113.36
Varying Expenses		0004	18, 966.08	16, 601.47	19, 713.03	*2, 304.61	748.65	1, 006.12
Office Salaries		0100	9, 453.04	8, 850.50	9, 866.62	*632.54	373.36	4, 362.45
Office Expenses		0059	11, 189.99	49, 522.74	53, 885.19	38, 332.75	42, 605.20	*613.02
Business, Letting & Mites		0059	9, 483.04	6, 126.72	8, 512.70	*357.32	*970.34	*1, 712.52
Adm. & Genl. Expenses		0013	2, 465.59	5, 944.25	3, 331.73	2, 578.66	866.14	*1, 006.10
Insurance (Risk Expense)		0030	7, 586.43	5, 913.37	4, 822.08	*1, 668.16	*2, 764.35	
Return on Investment								
Total "Costs"		0536	\$101, 658.18	\$144, 754.14	\$157, 592.15	\$43, 095.96	\$55, 935.97	\$12, 838.07
Profit		0040	7, 594.43	6, 600.94	9, 928.78	*925.49	*2, 342.35	3, 267.84
Uninsurable Risks		0014	758.64			*708.64		
Total Costs + Profit		0580	\$110, 003.25	\$151, 415.08	\$167, 520.93	\$41, 411.83	\$57, 517.68	\$16, 105.85
All species:								
Salesmanship & Buying			\$178, 434.85	\$434, 099.98	\$507, 032.59	\$55, 635.13	\$128, 597.74	\$72, 952.61
Varying Salaries			217, 839.83	299, 478.80	316, 852.58	81, 638.97	99, 012.75	17, 373.78
Varying Expenses			39, 097.83	40, 270.42	40, 270.42	1, 262.59	1, 262.59	
Office Salaries			20, 234.39	190, 326.74	197, 280.21	20, 088.35	3, 512.20	*3, 016.53
Office Expenses			96, 297.99	96, 810.19	109, 971.24	3, 668.26	33, 673.25	10, 161.05
Business, Letting & Mites			132, 799.17	427, 870.19	451, 142.26	295, 080.02	318, 352.09	23, 272.07
Adm. & Genl. Expenses			105, 762.83	103, 292.36	109, 127.38	*2, 470.47	3, 364.55	6, 835.02
Insurance (Risk Expense)			21, 097.06	40, 986.29	32, 313.26	19, 918.63	11, 245.60	*8, 673.03
Return on Investment			49, 161.88	38, 355.59	59, 719.21	*16, 809.29	10, 554.33	21, 363.62
Total "Costs"			\$1, 210, 601.43	\$1, 674, 460.56	\$1, 813, 709.15	\$403, 856.13	\$603, 104.72	\$130, 248.59
Profit			101, 432.82	69, 865.07	115, 896.35	*31, 567.75	14, 433.53	46, 001.28
Uninsurable Risks			10, 216.43			*10, 216.43	*10, 216.43	
Total Costs + Profit			\$1, 322, 253.68	\$1, 744, 325.63	\$1, 929, 575.50	\$422, 071.95	\$607, 321.82	\$185, 249.87

In United States District Court

Statement as to Petitions Filed

The petitions filed in the several remaining cases being Docket Nos. in Equity Nos. 2329-2378, Inc., are identical with the petition above set out and filed in Case No. 2828, except in respect to the name of the individual plaintiff (or plaintiffs) and the amounts in dollars or percentages appearing in Section VIII of each of the petitions applicable under the allegations to the particular plaintiff in the specific suit. The name or names of the plaintiff (or plaintiffs), the number of the suit, and the specific amounts set forth in the order of their appearance in Section VIII of each petition are for the purpose of brevity condensed and set forth in the following table:

Docket No.	Name of plaintiff	Amount appearing in first paragraph of sub-section (a) of section VIII		Amounts appearing serially in second paragraph of sub-section (a) of section VIII						Amounts appearing serially in second paragraph of sub-section (b) of section VIII	
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)		
2329	J. M. Radland, W. B. Storts and W. L. Burruk, partners d/b as Radland, Storts & Burruk, L. S. Comm. Co.	\$12,257.72	8%	13%	15.50%	6.53%	13.56%	\$—	\$6,500.00		
2330	H. H. Klecker, d/b as Hinkle Klecker Sheep Com. Co.	5,058.70	19%	76%	—%	—%	13.91%	\$356.79	6,000.00		
2331	R. H. Lewis and S. H. Flournoy, Partners d/b as Lewis-Flournoy Livestock Com. Co.	6,824.37	17%	11%	12.98%	2.56%	12.04%	1,492.97	7,000.00		
2332	Grover C. Maxwell and Ben J. Furnish, Partners d/b as Maxwell-Furnish Livestock Com. Co.	4,628.73	—%	—%	11.36%	32%	6.14%	1,000.84	8,000.00		
2333	John M. Nichols, d/b as John M. Nichols L. S. Comm. Co.	6,119.03	—%	—%	11.75%	1.82%	5.96%	None	4,000.00		
2334	Bowles Livestock Com. Co., a Corporation.	13,820.60	11%	18%	17.78%	1.95%	8.81%	None			
2335	Cridder Brothers Com. Co., a Corporation.	14,340.07	6%	14%	17.92%	2.46%	9.42%	28.37	12,400.00		
2336	Chas. Lixop Commission Co., a Corporation	14,311.67	12%	26%	19.56%	5.4%	7.38%	None	10,800.00		
2337	E. W. Elliott & R. K. Swain, Partners d/b as Elliott, Swain & Company...	4,443.84	16%	1%	13.48%	70%	8.68%	2,932.93	7,200.00		

38	Farrar, Davis & Campbell Livestock Com. Co., a Corp., -	22%	8%	14.52%	1.65%	1,507.90	10,000.00
39	W. O. Gushik, d/b as Gladwin Livestock Com. Co.	15%	9%	12.57%	11.05%	1,579.80	7,000.00
40	O. C. Hagaut, John H. Wilson, and Glenn Hagaut, Partners d/b as Hagaut-Wilson L. S. Com. Co.	3%	8%	13.19%	5.48%	2,241.10	15,150.00
41	W. M. Liegett, d/b as K. C. Livestock Com. Co.	8%	10%	15.09%	3.93%	None	6,000.00
42	Fern O. Sanders, d/b as Fern O. Sanders L. S. Com. Co.	7%	53%	14.96%	9.25%	508.01	22,200.00
43	Stuart-Robinson-Hoover Company, a Corp.	16%	24%	14.96%	2.39%	4,308.03	22,200.00
44	R. W. Wester & Joseph P. Smith, Partners, d/b as Wester Brothers & Smith Commission Company	1	9%	14.97%	54%	135.00	8,100.00
45	Stagner, Rambinet & Willis L. S. Com. Co., a Corp.	6%	6%	13.47%	1.16%	27.50	10,400.00
46	Geo. S. Tamblin, d/b as Tamblin Com. Co.	16%	6%	14.49%	5.55%	1,240.58	8,500.00
47	Henry F. Carnes, d/b as H. F. Carnes L. S. Com. Co.	24%	19%	15.80%	2.34%	403.98	1,500.00
48	Warren Cummings, d/b as Warren Cummings L. S. Com. Co.	6%	38%	11.71%	8.44%	1,551.32	6,000.00
49	Drum-Standish Com. Co., a Corp.	1	28%	13.04%	1.22%	None	29,500.00
50	Link Fasken, d/b as Link Fasken L. S. Com. Co.	1	—	11.66%	8.36%	402.50	750.00
51	H. E. Long, Robt. B. Perry, and B. W. Furry, Partners d/b as Long-Perry Livestock Com. Co.	6%	14%	18.07%	7.96%	2,102.73	14,000.00
52	L. E. Tice, d/b as Knight & Tice Sheep Com. Co.	14%	31%	—	11.06%	2,950.39	5,000.00
53	Chas. F. Vlerogg & Robt. H. Stover, Partners, d/b as W. M. Lettett Sheep Com. Co.	13%	11%	13.36%	—	4,247.05	10,000.00
54	National Livestock Com. Co., a Corp.	18%	17%	—	3.30%	1,124.18	35,000.00
55	Bryant Poole, D. L. Dempsey & James Rutherford, Partners doing business as Poole-Dempsey-Rutherford L. S. Com. Co.	6%	22%	13.62%	3.93%	2,065.10	12,000.00
56	Harry Kennaley, d/b as Harry Kennaley Com. Co.	12%	25%	11.35%	8.64%	None	10,000.00
57	Fluke-Martin, F. H. Conn, Alan F. Wilson & Chas. O. Smith, Partners d/b as John Clay & Company	15%	28%	10.92%	3.97%	10,520.04	8,200.00
58	Ralph W. Wright & Wm. N. Baucus, Partners, d/b as Wright & Baucus Livestock Com. Co.	18%	8%	16.36%	4.31%	None	10,000.00
59	Swift & Henry Livestock Com. Co., a Corp.	5%	14%	12.93%	4.42%	2,222.53	13,500.00
60	L. Knott, Henry F. Thiels, F. W. Thiels, and A. C. Thiels, Partners d/b as H. Thiels & Sons	14%	14%	13.93%	2.91%	None	41,800.00
61	Han Knighton, d/b as Han Knighton L. S. Com. Co.	8%	17%	13.96%	.06%	624.19	16,500.00
62	J. M. Laird and G. T. Laird, Partners d/b as Laird Brothers Livestock Com. Co.	19%	11%	10.11%	8.2%	352.78	3,200.00
63	Marlin, Blomquist & Lee Com. Co., a Corp.	1	13%	14.52%	.67%	None	9,000.00
64	H. M. Baker, W. C. Bradshaw, Barney Metz and Louise M. Moffett, Partners d/b as Moffett Livestock Com. Co.	21%	7%	15.33%	6.33%	None	42,200.00
65	Jay D. McCormick, d/b as Jay D. McCormick L. S. Com. Co.	13%	16%	13.24%	7.80%	None	11,000.00
66	K. C. Kile, d/b as Kile Com. Co.	17%	15%	12.76%	8.2%	970.18	2,000.00
67	Ryan-Robinson Com. Co., a Corp.	20%	7%	13.25%	4.11%	None	6,000.00
68	Rep L. Welsh, d/b as Welsh Livestock Com. Co.	0	9%	14.04%	5.28%	None	18,030.00
69	Witherspoon Livestock Com. Co., a Corp.	10%	—	15.79%	4	223.01	1,500.00
70	W. E. Curtis, d/b as W. E. Curtis & Company	14%	16%	16.63%	11.41%	None	10,283.80
71	Norman B. Greer, d/b as Greer & Company	23%	14%	15.07%	9.62%	None	6,000.00
72	Inman-Hutton Livestock Com. Co., a Corp.	10%	21%	11.93%	1.86%	None	8,000.00
73	Walter O. Land & John E. Maze, Partners, d/b as Walter O. Land Livestock Com. Co.	38%	33%	14.33%	10.49%	1,432.47	3,500.00
74		5%	28%	13.51%	7.62%	1,192.38	11,000.00
					8.73%	None	1,000.00

See footnotes at end table.

Docket No.	Name of plaintiff	Amounts appearing serialim in second paragraph of sub-section (a) of section VIII						Amounts appearing serialim in second paragraph of sub-section (b) of section VIII	
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
2275	Less White, d/h as Less White Livestock Com. Co.	\$3,900.86	1 12%	3%	13.11%	3.12%	9.58%	\$714.95	\$4,000.00
2276	Wilson Egan & Co., a Corporation	28,728.01	10%	23%	16.14%	4.36%	6.28%	26.22	20,000.00
2277	Burlington Livestock Com. Co., a Corpn.	45,631.08	51%	25%	15.59%	3.65%	7.33%	4,080.74	24,083.56
2278	Cassidy Southwestern Com. Co., a Corpn.	20,579.93	—%	—%	13.81%	2.39%	11.46%	948.31	16,000.00

Legend

- (1) The figures in this column are alleged in the petition to represent the amount by which the gross revenue which would have been received by petitioner in the year 1931 if the Schedule of Rates and Charges prescribed by the Order had been in force and effect would have been less than the total calculable costs incurred by petitioner in the rendition of stockyard services (Res. Exh. 207).
- (2) Alleged to be the amount in percentage by which the gross yield to individual petitioner of charges actually collected in 1932 was less than the gross yield of charges collected in 1931.
- (3) Alleged amount in percentage by which the gross revenue of petitioner was less for the first five months of 1933 than during the first five months of 1932.
- (4) Alleged to represent in percentage the amount by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of individual petitioner would reduce revenues in respect to cattle and calves.
- (5) Alleged to be the amount in percentage by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of petitioner would reduce revenues in respect to hogs.
- (6) Alleged to be representative in percentage of amount by which the Schedule of Rates and Charges ordered by the Secretary if applied to the business of the individual petitioner would reduce revenues in respect to sheep.
- (7) Alleged to represent the total compensation for personal services rendered by the owners of petitioner agency if the rates and charges ordered by the Secretary had been in effect in 1931 and petitioner's incurred costs exclusive of any compensation to owners for personal services, as found by Government's Chief Accountant in Cost Study introduced in evidence (Ex. 115).
- (8) Alleged to be representative of the reasonable value of the personal services rendered by the owner or owners of petitioner agency as shown by evidence submitted on behalf of the appellants. The number of owners in respect to each agency is set out in the evidence and in the individual petitions and the amount given includes all owners actually employed in the rendition of the service in connection with the operations of the individual petitioner in the year 1931.
- † Indicates gain instead of loss.

In United States District Court

In Equity. No. 2328

[Title omitted.]

Temporary restraining order

Filed July 22, 1933

Now on this 22nd day of July, 1933, comes the petitioner as plaintiff herein, and presents to the undersigned Judges of this Court a verified petition wherein it is prayed that an order staying and suspending the enforcement, operation and execution of the Order of June 14, 1933, of the defendant Secretary of Agriculture issue against the defendants, and each of them, as in said petition prayed.

And the Court, being duly advised in the premises, finds that notice of application for such Restraining Order has been duly given to the defendants in accordance with law and that immediate and irreparable injury and damage will result to petitioner unless such Order shall issue according to the prayer of the Petition, and that petitioner is entitled to a temporary restraining or Stay Order as prayed, in this:

That petitioner has an established business as a market agency, registered under the Packers and Stockyards Act, 1921, engaged in the sale and purchase of livestock for others at the Kansas City Stock Yards, in Kansas City, Missouri, and that, if such temporary restraining and stay order suspending the enforcement of said Order of the Secretary of Agriculture is not granted, the defendants will, before the hearing upon the application for temporary injunction as prayed in said Petition, have it within their power, and they will, proceed to enforce the penalties provided for violation of said Order by the Packers and Stockyards Act, 1921, and will institute a multiplicity of suits against the petitioner on each of the grounds of supposed violation aforesaid and otherwise proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said Order the petitioner would be unable to collect from the users of its service the differences between the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States.

Now, Therefore, it is by this Court ordered that the defendant Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors, agents and representatives of the United States, and all other persons acting or claiming, or assuming to act, for and under authority of the defendants, or either of them, and all other persons who now seek or attempt, or shall hereafter seek or attempt, to interfere with or abridge the right of the plaintiff or do any act in any wise militating against the right of the plaintiff to collect, demand, receive, and retain rates and charges for stock-yard services at the Kansas City Stock Yards in accordance with the Schedule of Rates and Charges of petitioner now on file with the Secretary of Agriculture be, and they are hereby, restrained and enjoined from instituting, prosecuting, or aiding in instituting or prosecuting, any proceeding or action for penalties, fines, or imprisonment against the petitioner or its agents because of failure to comply with said Order of the Secretary of Agriculture of June 14, 1933, and the enforcement, operation and execution of said Order, and each and every part thereof, by the defendants or any persons acting or claiming, or assuming to act, for or under the authority of defendants, is hereby stayed and suspended for 60 days from the date of this Order, or until further order of this Court.

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

ARBA S. VAN VALKENBURGH,
ALBERT L. REEVES,
MERRILL E. OTIS,
Judges.

[File endorsement omitted.]

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In United States District Court

In Equity. No. 2328

[Title omitted.]

Order continuing in force temporary restraining order

Filed September 19, 1933

Now on this 19th day of September 1933, comes the petitioner as plaintiff herein, and it appearing that the hearing upon the application for a temporary injunction herein has been continued, and that the time allowed by law for the filing of answer herein has been extended by the Court at the request of the defendants;

And the Court being duly advised in the premises, finds that immediate and irreparable injury and damage will result to petitioner unless the temporary restraining order hereinbefore issued is extended and continued in force and effect,

Now, Therefore, it is by This Court Ordered that the temporary restraining order herein issued be and hereby is continued in whole and in accordance with all the terms and conditions thereof in force and effect until decision by this Court upon the application for a temporary injunction as prayed for in the petition filed herein.

ARBA S. VAN VALKENBURGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

_____, *District Judge.*

The Clerk is directed to enter an identical order in Causes 2329 to 2378, both inclusive, in equity, by this Court, making the identical Order effective in each of said cases.

Dated this 19th day of September 1933.

ARBA S. VAN VALKENBURGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

_____, *District Judge.*

[File endorsement omitted.]

163

In United States District Court

In Equity. No. 2328

[Title omitted.]

And in Equity Cases No. 2329-2378, inclusive, which are companion cases to the above-entitled case.

Answer

Filed November 25, 1933

Come now the defendants in the above-entitled cause and companion cases, and make answer to the petitions hereinbefore filed as follows:

1. Defendants admit the allegations contained in Sections I to III of said petitions.

2. Answering Section V of said petitions: defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section V of said petitions and particularly subsection (a) thereof, defendants admit that the evidence shows that the diminution in the net moneys available to owners of petitioner market agencies in 1931, as compared with the net moneys available to such owners in 1929, was due in part to a reduction of approximately 13% in gross revenues, and that petitioner market agencies did not reduce proportionately their operating costs, but defendants deny that such costs could not have

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been reduced. Defendants are without knowledge as to the amount of the selling and buying charges collected by petitioner market agencies during the year 1932 or during the first five months of the year 1933, but say that such matters are not relevant or material to the determination of these cases and that proof thereof is not admissible before this Court.

(b) Further answering Section V of said petitions and particularly subsection (b) thereof, defendants admit that the Secretary found in his Order (Paragraphs 142 and 143) that it is reasonable to expect a good and experienced salesman of cattle and calves to sell 29,000 head of cattle and calves per year; such a salesman of hogs to sell 85,000 head of hogs per year; and such a salesman of sheep to sell 250,000 head of sheep per year. Defendants say that the above estimates of what constitutes a reasonable year's work for salesmen are below the estimates of those salesmen who testified; and that a considerable number of salesmen now employed by petitioner market agencies at Kansas City have attained and exceeded the standard of performance mentioned in the Order, notwithstanding the highly competitive and overmanned condition existing at the Kansas City market. Defendants admit that the Secretary found that the conditions under which salesmanship is performed at the Kansas City market customarily include services incidental to the selling operation, and that these services include the maintenance of contacts with the owners of livestock prior to shipment, appraisal in the country, supervision en route to market either while on pasture, in feed lots, or at railroad feeding stations keeping informed as to changing market conditions, sorting and grading livestock at the market, consulting with owners of livestock at the market, or advising them of the result of sales if away from the market, together with other miscellaneous duties. Defendants further admit the allegation that the evidence at the hearing showed that livestock salesmen, unlike ordinary salesmen, determine the price for the commodity they sell.

165 (c) Further answering Section V of said petitions and particularly subsection (d) thereof, defendants admit that the costs classified as "Business-Getting and Maintaining Expenses" include amounts actually expended during the year 1931 by petitioner market agencies for traveling expenses incident to the appraisal of livestock before a sale, and supervising the feeding of livestock en route to market at feeding stations, advertising, the preparation, printing, and posting of circulars and market reports sent to stockmen; automobile maintenance and transportation; and dues and assessments paid to the Kansas City Live Stock Exchange. Answering the allegation that during the period mentioned in the Order commission rates at the Chicago and St. Louis markets were substantially higher than those charged by petitioner market agencies, defendants say that such matters are not relevant or material to the determination of this case, and therefore require no answer. Answering the allegation that the undisputed evidence dis-

closes the intensity of competitive efforts of packers and others to divert livestock from the Kansas City market, defendants admit that this is true only as to hogs.

3. Answering Section VI of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VI of said petitions and particularly subsection (a) thereof, defendants deny that the Schedule of Rates and Charges first placed under inquiry was established after hearing and investigation by the then Secretary as a just, reasonable, and nondiscriminatory schedule of rates and charges. Defendants say that such Schedule was determined in 1923 by an arbitration proceeding, that such proceeding was conducted upon the suggestion and agreement of the private parties thereto, and that the persons who served as arbiters therein were chosen and agreed upon by said private parties and did not serve in any official capacity which they may have possessed under the Government of the United States but purely by virtue of their selection by agreement of the parties to said proceeding; that the then Secretary of Agriculture merely gave his approval to said plan of arbitration as a mode of compromise and settlement agreeable to the parties thereto. Defendants admit that the Schedule of Rates and Charges agreed upon at said arbitration in 1923 was higher by more than 10% than the

166 rates and charges found to be unjust and unreasonable by the Secretary in this proceeding, and further admit that the rates and charges under inquiry expressed in percentage of net-sales proceeds handled were less at the time of the hearing than 2% thereof and less than the charges for commission or brokerage service for selling other agricultural produce. Defendants further admit that during the period of the World War, and from 1913 to 1919, the rates charged by petitioner market agencies were increased by 10% and that increases of approximately 200% occurred in the cost of living, farm wages, general hourly wages and livestock prices. But defendants say that none of the allegations in said subsection (a) is relevant or material to the determination of this case.

(b) Further answering Section VI of said petitions and particularly subsection (b) thereof, defendants admit that the Secretary stated in Paragraph 129 of his Order that the Packers and Stockyards Act, 1921, does not clothe the Secretary with authority to determine how many agencies would be required to handle properly the business at the Kansas City Stockyards. Defendants say that none of the allegations contained in said subsection (b) is relevant or material to the determination of this case.

(c) Further answering Section VI of said petitions and particularly subsection (d) thereof, defendants admit that the Secretary found (Paragraph 50 of the Order) that the demand for livestock at Kansas City, especially for hogs, is greater than that supplied by the livestock arriving at the public market and that a large number of hogs destined for local slaughter does not pass through the stock-

yards but is purchased directly by packers. Defendants admit that the market price determined at the public stockyards at Kansas City and elsewhere has much weight in determining the prices paid for livestock bought and sold at private stockyards, but say that such matters are not relevant or material to the determination of this case. The allegation that the packers acquire livestock off the public market without contributing proportionately to the cost of maintenance of the public market at Kansas City is likewise wholly irrelevant and immaterial to the validity of the Secretary's Order and to this suit.

(d) Further answering Section VI of said petitions and particularly subsection (e) thereof, defendants admit that the Order
167 contains a finding of fact (Paragraph 19 of the Order) that livestock tends to move from producer to consumer by the most economical route.

4. Answering Section VII of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VII of said petitions and particularly subsection (a) thereof, defendants admit that the costs and expenses recognized by the Government accountant included no expenses incident to interest paid, donations to Community Chest, reserve to meet uninsurable hazards, or allowance for profits, but defendants deny the inference that the Secretary was bound by the opinion of the Government accountant in these respects, and say that the Secretary made a proper allowance for interest, reserve to meet uninsurable hazards, and profits. Answering the allegation on page 17 of the petition to the effect that the separation of species costs into functional costs such as selling, yarding, office work, administration, business getting, etc., was arbitrary and not based on any natural segregations incident to the actual performance of these functions, defendants say that the business of petitioner market agencies naturally divides itself into such functional divisions; that such divisions were followed by the accountant who testified for petitioner market agencies; and that such functional division for the purpose of determining costs is not affected by the fact that the same men commonly perform several different functions. Defendants further say that such separation of costs into functional costs is not arbitrary and that it does not vary from the facts of the business of petitioner market agencies. Defendants admit that the reasonable unit costs found by the Secretary are lower in most instances than those costs actually incurred by petitioner market agencies, and defendants say that the purpose of the inquiry was not to construct a rate order based upon costs actually incurred in maintaining an overly-competitive market, but rather to determine what costs are reasonable. Defendants further say that the Order of the Secretary is not to be tested by whether it allows costs actually incurred but rather by whether the costs allowed in the Order are in themselves reasonable to the shippers of livestock and to the market agencies.

(b) Further answering Section VII of said petitions and particularly subsection (b) thereof, defendants say that the Order in Paragraphs 159 to 163 allows reasonable per head costs to cover compensation for management. Defendants admit that in Paragraph 159 of the Order the cost of management of the two cooperative market agencies on the Kansas City Stockyards is taken into account in determining fair management costs.

(c) Further answering Section VII of said petitions and particularly subsection (c) thereof, defendants admit that the Order does not allow as an element and part of the capital of petitioners any amount for going concern value. Defendants further admit that the Order holds that a rate of return of 6% on fixed capital and 7% on working capital used by petitioner is reasonable, and that the Order allows that amount only in calculating the gross return recognized and covered into the rates and charges established.

(d) Further answering Section VII of said petitions and particularly subsection (e) thereof, defendants admit that the Secretary disallowed as elements of reasonable cost, and did not cover into the rates and charges prescribed, moneys expended for donations to the Community Chests maintained by the Chambers of Commerce in Kansas City, Missouri, and Kansas City, Kansas.

(e) Further answering Section VII of said petitions and particularly subsection (f) thereof, defendants admit that the effect of the Schedule of Rates and Charges is to permit increases in rates to dealers registered under the Packers and Stockyards Act, of 1921, and to permit increases in rates and charges for buying livestock.

5. Answering Section VIII of said petitions, defendants deny each and every allegation contained therein, except as hereinafter otherwise expressly admitted.

(a) Further answering Section VIII of said petitions, and particularly subsection (a) thereof, defendants deny on information and belief the allegation therein contained to the effect that if the prescribed Schedule of Rates and Charges had been in force in 1931 each petitioner would have received an amount, stated in each petition, less than the total calculable costs incurred by each such petitioner in the rendition of stockyards services that year.

Defendants are without knowledge as to the truth of the allegations that the gross yield to each petitioner of the rates and charges collected was less in 1932 by a stated percentage than the revenue received in 1931, and that the gross yield for the first five months of 1933 was less by a stated percentage than that for the first five months of 1932, and also the allegation of the percentage of further reduction which the application of the prescribed rates and charges would cause each petitioner as to each species handled, but defendants say that such matters are irrelevant and immaterial to the determination of this case, and that proof thereof is not admissible before this Court.

Further answering said subsection (a), defendants say that none of the facts alleged therein is relevant or material to the validity

of the Secretary's Order, or to this suit, and that the lawfulness of the rates and charges prescribed in said Order is not to be determined by whether or not each petitioner could earn a sufficient amount thereunder to cover costs as high as those heretofore incurred.

(b) Further answering Section VIII of said petitions and particularly subsection (b) thereof, defendants say that the accountant who testified for the Secretary did not in his cost study set forth the total costs of operation of petitioners for the purpose of showing what were reasonable costs, but he merely testified as to the amount of such costs as he found them. Defendants say that it is irrelevant and immaterial to the validity of the Secretary's Order and to this suit whether or not the gross yield of rates and charges prescribed in the Order, if applied in 1931, would have been less than the cost of operation of the business of any one petitioner during that year. Further answering said subsection (b), and particularly lines six to twenty-three, inclusive, thereof, defendants are without knowledge as to the truth of the allegations therein contained and they therefore deny on information and belief each and every such allegation.

(c) Further answering Section VIII of said petitions and particularly subsection (d) thereof, defendants admit that on page 39 the Order shows that 11 firms handled more than 50% of the total market volume of livestock at the Kansas City Stockyards in 1931, and that 23 firms handled over 75% of the total market volume. Defendants deny the allegation that the Order bases the rates and charges prescribed therein upon the assumption that the firms doing the largest relative volume of business operated their businesses 170 more economically and efficiently than other firms doing a lesser volume of business. Defendants deny upon information and belief all of the other allegations of said subsection (d).

(d) Further answering Section VIII of said petition and particularly subsection (e) thereof, defendants are without knowledge as to the truth of the allegation therein contained, but say that such matter is not relevant or material to the determination of his case, and that proof thereof is not admissible before this Court.

6. Except as herein otherwise expressly admitted, defendants deny the truth of each and all of the allegations contained in said petitions.

Wherefore, having been fully answered, defendants pray that the petitions be dismissed at the cost of the petitioners and for the benefit of such other order or orders as the Court may deem appropriate.

Harold M. Stephens, Assistant, Attorney General; Wendell Berge, Special Assistant to the Attorney General; William L. Vandeventer, United States Attorney; Seth Thomas, Solicitor, Department of Agriculture; J. S. Bohannon, Attorney, Department of Agriculture; G. N. Dagger, Attorney, Department of Agriculture.

[File endorsement omitted.]

In United States District Court

Decree

Filed December 20, 1934

This cause came on for final hearing on the petition herein praying for a decree enjoining and restraining the defendants from enforcing an Order of the Secretary of Agriculture, dated June 14, 1933, in a proceeding pending before the Secretary of Agriculture known as "Secretary of Agriculture v. L. B. Andrews, et al., Docket No. 311," which Order prescribed the maximum rates and charges for sockyard services rendered by petitioner and other market agencies doing business at the Kansas City Stockyards in Kansas City, Missouri. The record made at the hearings before the Secretary was received in evidence by this Court, and some additional evidence was presented by petitioner, oral arguments were made, briefs were filed and the case was fully submitted to this Court by counsel for both parties.

In accordance with the views heretofore expressed in Opinion of this Court, it is hereby

Ordered, adjudged and decreed that the petition hereinbefore filed by the petitioner be, and the same is, hereby dismissed at petitioner's cost, and that the temporary restraining order heretofore granted, be, and the same is, hereby dissolved and set aside.

It is further ordered that petitioner shall, within sixty days from the date hereof, refund to the users of petitioner's services that portion of the rates and charges collected by petitioner since the 24th day of July 1933, which is in excess of the maximum rates and charges prescribed as reasonable in the Order of the Secretary of Agriculture, dated June 14, 1933, which excess amounts have been deposited with the Clerk of this Court each week during the period since the temporary restraining order was granted, and that petitioner shall as soon as possible after the expiration of sixty days from the date of this Order file with this Court under oath a true and accurate account of the amounts so refunded, together with the names and addresses of the persons to whom refunds have been made, and also the names and addresses of persons to whom refunds are due but to whom payment has not been made, and the reasons therefor, together with a sworn statement to the effect that such amount covers all the refunds which petitioner is obligated to make under the terms of this order.

Exceptions are allowed petitioner to the findings, conclusions, and decree of this Court.

Dated this 20th day of December 1934.

ARBA S. VAN VALKENBERGH, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

[File endorsement omitted.]

No. 2328. And Related Cases Nos. 2329-78

[Title omitted.]

Petition for rehearing

To the Honorable the Judges of the District Court of the United States, for the Western Division of the Western District of Missouri:

Comes now the above-named plaintiff and shows to the court that he is aggrieved by the opinion and decree of the court in the above-entitled cases in which the court dismissed on final hearing plaintiff's petition for a permanent injunction against an order dated June 14, 1933, issued by the Secretary of Agriculture, prescribing certain rates and charges to be observed by plaintiff in its business as a livestock market agency at Kansas City, and plaintiff respectfully requests this court to grant a rehearing for the following reasons:

I

That the opinion and decree of the court contain and are based upon novel but erroneous principles of law in that:

(a) The factors which the court, at pages 4 and 5 of the main opinion, prescribes as proper for the use of the Secretary in fixing reasonable maximum rates to be observed by all of the livestock market agencies engaged in separate and distinct businesses as competitors on a given market necessarily involve the elimination for rate-making purposes of all competitive costs; disregard the actual experience of these agencies in the matter of costs and expenses; and base rates entirely upon hypothetical considerations and assumed conditions contrary to the actual facts and conditions, to well-established and long-recognized rules of law in rate-making cases, and to the terms and provisions of the Packers and Stockyards Act, which requires this public livestock market to be maintained as a competitive market.

II

That the court misconstrued and failed to consider the objections made by plaintiff to the findings of the Secretary involved in the present case in that:

(a) The court construed Subdivision (a) of Section VII of plaintiff's petition, and defendants' answer thereto, as presenting only the issue of whether such findings were supported by the evidence; that, on the contrary, the question there presented was whether an unreasonable, arbitrary, and illegal method, as a matter of law, was employed by the Secretary in his purported findings as to reasonable functional unit costs for various functions of the business of these market agencies into which the Secretary had divided the

operations of these businesses, and as to whether an unreasonable, arbitrary, and illegal method was employed by the Secretary in his purported finding of total unit costs through the combining of said separate "reasonable" functional unit costs as found by the Secretary.

III

That the opinion of the court is inadequate, incomplete, and too general in character in that:

(a) It does not meet the requirements of Equity Rule 70½ or of the decisions generally of the United States Supreme Court;

(b) The finding of the court that there was substantial testimony "to support every challenged finding" overlooks and disregards the fact that many of the challenges as contained in plaintiff's petition were admitted expressly or in effect by the answer filed by defendants;

(c) The action of the court in adopting as its findings of facts all the findings of fact of the Secretary makes it uncertain and subject to misunderstanding as to just what the court's findings of fact were;

(d) The court discussed the issues under four major headings, but overlooked and disregarded the fact that the various subdivisions of various sections of the petition contain numerous challenges to the findings and order of the Secretary, and that, except as to the subdivisions contained in Section VII of plaintiff's petition, the
174 court does not discuss any of the issues presented in these subdivisions and makes no findings in respect thereof;

(e) The court does not in its opinion disclose which of the issues presented and not discussed by the court are regarded by the court as immaterial and irrelevant and which are regarded as material and relevant;

(f) The court, at page 1 of the main opinion, through inadvertence states that the number of separate suits pending before this court involving the findings and order of the Secretary is 59, whereas the actual number of such suits was 50; and

(g) The court, at page 3 of the main opinion, inadvertently purports to quote for the purpose of comparison with existing rates the rates prescribed in the order of the Secretary as applying to calves, whereas the rates quoted in the opinion apply to hogs.

Wherefore, plaintiff prays the court to grant a rehearing, humbly submitting to such orders as the court may make if the application be without merit.

JOHN B. GAGE,
CARSON E. COWHERD,
Attorneys for Plaintiff.

Memorandum in Support of Plaintiff's Petition for Rehearing

The importance of the issues here involved cannot be overstated or overemphasized. Many of these issues are novel and are vital

to the important industry in which these plaintiffs are engaged. It becomes extremely necessary, therefore, that the opinion contain a clear, definite, and complete statement of the basis of the decision of the trial court.

Opinion Eliminates Competitive Costs

The court in the main opinion holds, as we read it, that the proper rate-making factors to be employed for an industry in which separate organizations, corporate or otherwise, compete with each other for business are to, first, ascertain "the total volume of business" to be handled by all these competitors on the Kansas City market, second, determine hypothetically how many men are necessary for the "efficient handling of that business," and third, determine the 175 "reasonable costs" of handling that business including the "reasonable compensation" which that hypothetical number of men should receive. This, as we interpret the opinion, requires the hypothetical assumption that the entire business at a particular market is conducted as a single unit. Under this method, costs made necessary by competition are eliminated from consideration for rate-making purposes. Necessary costs cease to be "reasonable" costs because produced by competition. Under this system, actually experienced costs may be ignored and disregarded and the allowance of reasonable costs is to be determined as stated in the opinion on the basis of "judgments" as arrived at by the rate maker. On the basis of such "judgments" is to be determined the number of men required for the entire business, the proper compensation to that number of men, the amount of capital needed, and the fair return on that capital. Monopoly is thus assumed to obtain where in fact none exists. Competition is assumed to be non-existent; when the facts are entirely to the contrary. It is evident under this method of rate making, that in any future hearing involving the rates of these plaintiffs, the actual costs which they sustain in their respective businesses and the effect of ordered rates upon the net returns from their respective businesses will become practically irrelevant and immaterial. Under such a method of rate making, all competitive costs are eliminated, actually experienced costs are cast aside, the effect of rates prescribed upon any particular market agency is disregarded, operation at capacity at all times is assumed, and the true consent of a "market" as a place of competitive buying and competitive selling is ignored.

Packers and Stockyards Act Demands Competition

Under the Packers and Stockyards Act, the term, "market agency," is defined as being any person "engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission

basis; or (2) furnishing stockyard services."¹ And by this same act, the term "stockyard," as used therein, is defined as a place commonly known as a stockyards, "conducted or operated for compensation or profit as a public market."—The phrase "operated as a public market" was not included in the original bills that were introduced in Congress, but was inserted upon consideration of the bills before the Committees of the House and the Senate.

Moreover, an examination of Section 192, Chapter 9, Title 7, U. S. C. A., will disclose that the unlawful practices therein enumerated which the act undertook to prohibit were those practices which tended to create a monopoly and to stifle and eliminate competition in the buying and selling of livestock upon these public markets. The fact that the Secretary has no right under the act to refuse to permit the registration as market agencies of persons desiring to engage in that business but must register them provided they give the required bond, likewise discloses the intention of Congress to make sure that competition on these public markets should be maintained and perpetuated rather than restricted or eliminated. All of these things show quite conclusively that it was never intended that these public markets should become monopolies in which all competition would be thereby eliminated. The legislative authority in positive terms recognizes competition and seeks to preserve it. The administrative authority seeks to destroy it or limit its effect. The stream is thus compelled to rise higher than its source. The court in requiring rates to be fixed on the hypothesis that competition shall be nonexistent as between these agencies and that the entire business at a particular public market shall be considered as if it were operated as a single unit has, therefore, lost sight of these facts.

Omaha Case Approved Use of Typical Costs

The so-called Omaha case may be considered as a milestone along the pathway of rate-making law, in that, under the "monopolistic" conditions there found to exist, the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs, according to the Secretary in that proceeding, represented those figures around which the costs of the different agencies at a given market tended "to cluster." Under this system of cost allowances, greater latitude is given to the rate maker. The "tend to cluster" formula is far more indefinite in its application than any of the other methods commonly employed in determining reasonable costs as, for instance, the use of the weighted average cost. But typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration.

¹ Subparagraph (c), Sec. 201, Ch. 9, Title 7, U. S. C. A.

² Subparagraph (a), Sec. 202, Ch. 9, Title 7, U. S. C. A.

Hypothetical Costs Approved by Opinion

In the present case, however, the Secretary has gone even further than he did in the Omaha case. Hypothetical costs are those based not upon conditions shown to presently exist but upon assumed conditions which the rate maker expects may or should exist at some future time. As to those costs which the Secretary believed the "conditions of the business" of these agencies tended to increase, he refused to use typical experience as a guide for determining reasonable costs. On the contrary, he based his allowances for costs of that class upon an assumed situation where competition is absent and a monopoly obtains. In other words, he used hypothetical costs. The court not only has approved the methods here employed by the Secretary but has gone even further than the Secretary in the main opinion and has approved the use of hypothetical costs in the determination of reasonable cost allowances for all kinds of expenses including both those which the Secretary believed the conditions of the business tended to increase and those which he believed the conditions of the business tended to keep down. The Secretary did presuppose, in the use of his rate-making processes, the existence of some competition. He refused to recognize all of the costs produced by that competition. He did, however, purport to fix rates that would be reasonable for those firms which received a sufficient volume of business to enable them to handle that business in a reasonably economical and efficient manner. The rate-making factors approved by the court are not so limited in scope or effect. The court in this opinion has conceded to the Secretary a breadth of power for which he did not contend. The decision has, therefore, taken on tremendous significance as a legal precedent. It is novel and far-reaching in its consequences and is not supported by any legal precedent. It is not even supported by the Omaha case. The decision affects all industry exposed to the exercise of rate making or price fixing through public authority.

178. Application of Rate-making Formula Destructive to Other Industries

Apply this theory of rate making to other lines of industry. We find from currently accurate economic studies that the ratio of actual operations to potential capacity in respect of railway transportation facilities is less than 33 $\frac{1}{3}$ %. In respect of the electric power systems, the average unused capacity in excess of the highest instantaneous peak load is 27.9%. The practical average load factor in electric power systems involves a utilization of only 54.7% of capacity. Pipe lines operate at 45% of capacity; pig iron manufacturers at 68%; copper smelters at 40.4%; petroleum refineries at 65.9%; bituminous coal industries at 50%; cotton spinning at 14.5%; wheat flour milling industry at 43.5%; and the wool industry at 41%.³

³ Brookings Institute "America's Capacity to Produce."

These ratios were determined for the year 1930 when business conditions were far more favorable than they were during the subsequent years of the depression. Consider the tremendous effect of applying the method of rate making or price fixing approved by the court to any of these industries. What capital would be needed to supply the light and power requirements of the entire United States assuming there were but one system and that it would be possible for a single system to serve the entire nation? What disposition would be made of the large number of plants and employees rendered unnecessary by such a consolidation? What would become of the unused capacity of these plants and, if rates were fixed on the basis of the used capacity under present conditions, where would the needed money come from to meet the capital requirements of these industries when capacity had to be increased and additions and improvements had to be made for that purpose? Moreover, the use of these rate-making factors would result in the elimination of all competitive costs such as advertising costs and business-getting and maintaining costs. When we come to apply these rate-making processes, we reach some degree of appreciation of the importance of the pronouncements contained in the opinion rendered by this court. The enormous pool of unemployed capital and labor which such a process would create, if, as suggested in the concurring opinion, all industry tried to operate "under the conditions of the order," would stagger the imagination to depict.

179 Opinion Goes Beyond Prudent Investment Theory.

Moreover, one of the factors which the court says must be considered is a fair return upon the capital required for the "efficient handling of the volume of business reasonably to be expected." Under any logical construction of the language used, this means that the capital requirements must be determined on the assumption that the entire business of all of these market agencies is operated as a single unit. The expression "efficient handling" obviously must relate to the time as of which the rate-making processes are actually being employed. In several important public utility rate cases decided by the United States Supreme Court, the minority of that court urged that "the prudent investment theory" was the correct and proper theory and method of determining the rate base. Notwithstanding these minority and dissenting opinions, the prudent investment theory has never, to our knowledge, been approved by the majority of the court in a single rate case. Even under the prudent investment theory, whether or not an investment is prudently made depends upon conditions obtaining at the time the investment was actually made and not upon conditions as viewed in the light of subsequent developments. Even under that method, obsolescence due to improved method or changed condition is not penalized. We submit, however, that the court in the main opinion

in the present case has gone far beyond even the prudent investment theory. Under this opinion, the amount of capital required for the efficient handling of the business is to be based upon idealistic conditions assumed to obtain at the time of the investigation into the reasonableness of the rates or after monopoly has developed at some future date. Under this opinion, obsolescence would no longer be recognized in the fixing of a rate base. The adoption of this method of determining a rate base overrules a long line of respectable authority to the contrary.

Opinion Not in Harmony with Recent Supreme Court Decision

Since the opinion was written in this case, the United States Supreme Court in the case of *Hegeman Farms Corporation v. Baldwin*, 79 L. Ed. 29, has handed down a decision which has considerable bearing on the question of whether proper rate-making factors 180 have been prescribed by the court in the present case. It dealt with the application of price-fixing authority to a business conducted by a group of competitors. A milk dealer in New York contested the validity, under the fourteenth amendment, of certain orders of the New York Milk Control Board fixing a minimum price at which milk dealers could sell milk to consumers. The court in that opinion emphasized that the Board's prices were only minimum prices. That presented a different situation from the one that obtains in the present case. Here the rates prescribed by the Secretary are maximum rates. That the Supreme Court distinguished the case on that basis, clearly appears from the opinion itself. The court said:

"For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been *no attempt* by the Board to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only." [Italics ours.]

* * * * *

"Much is made of a supposed analogy between the plight in which the appellant finds itself and that of public utilities subjected to maximum rates that do not yield a fair return, but the analogy when scrutinized is seen to be unreal. A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent."

This language is important not only in distinguishing this milk case from the present case, but it is also important in showing that, where the maximum rates prescribed are so low that the individual competitor is threatened with destruction, courts will grant relief.

In the present case plaintiff alleges that none of the plaintiffs
181 can render efficient service under the ordered rates and that this

is true when applied even to the firms or groups of firms handling the greatest volume of business. This issue is, therefore, before the court in the present case.

It is submitted, moreover, that the decision in this milk case has a direct bearing on the question of whether the court in the present case was correct in approving rate-making methods based on assumed and hypothetical conditions which presuppose the elimination of all competition and the handling of the business on the public market at Kansas City as a single unit. A further reference to the opinion will show that the court clearly recognized that even minimum rates in a competitive field must not be fixed on the assumption of the elimination of all competition, but that some consideration must be given to the realities of the situation. The court said:

"For anything there shown, other dealers at the same prices may now be earning profits. At all events, they are content or they would be led by self-interest to raise the present level. * * * To make the selling level higher might be unfair to the consumer; to make the purchase level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The fourteenth amendment does not protect a business against the hazards of competition. Public Service Commission of Montana v. Great Northern Utilities Co., supra., at page 135. It is from hazards of that order and not from restraints of law capriciously imposed that the appellant seeks relief. The refuge from its ills is not in constitutional immunities. * * * True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger; but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race."

182 The Court's Definition of Rate-making Procedure Should Be Stated with Greater Clarity

"It is possible, of course, that plaintiff has misconstrued the court's opinion and that the court did not intend that the decision have the

breadth and scope herein ascribed to it. Even if that be true the importance of these cases requires that the court state the basis of its decision so clearly and explicitly that there will be no reasonable grounds for misunderstanding it. In the past rate making has been confined principally to business in which there was a monopoly. It has only been in recent years that rate-making authorities have been concerned with prescribing a minimum or a maximum rate or price for a group of persons engaged in the same business. The trend today is clearly for more rather than less regulation of rates and prices than we have had in the past and this regulation is being applied more and more to groups of individuals engaged competitively in the same business.⁴ This is the first decision by the courts involving market agency rates since the Omaha case in which the failure of the agencies to offer evidence and the finding of monopoly prevented full consideration of the rate-making procedure to be employed under normal conditions. This case will, therefore, serve as a precedent to guide both the Secretary and the market agencies in the future at this and other markets. It is important, therefore, that the parties affected clearly comprehend and understand the guide that has been given them by the court in this decision.

While the court may not agree with us as to the law and the facts in this case, it cannot differ with us as to the importance of this decision either as a legal precedent or as to the great industry affected. The case will constitute another milestone along the pathway of rate-making law. We, therefore, urge further consideration by the court of this aspect of its opinion to the end that the holding of the court may be clarified and clearly understood.

183 Findings of Fact Are Not Sufficiently Comprehensive or Definite

The United States Supreme Court has repeatedly emphasized the necessity of adequate, complete, and specific findings of law and fact by the trial court covering all of the material issues involved in the case. The equity rules reflect these views in demanding that facts be found "specially." This is vitally necessary in a rate case which involves, as does the present case, a vast amount of documentary and oral testimony and in which complicated, novel, and far-reaching questions of law and fact are in issue. Such findings are necessary, not only in the interest of the litigants themselves, but in order that, through the narrowing of the issues by the trial court, the work of the appellate court on appeal may be lessened and made more effective. Thus, in *Virginia Railway Company v. United States*, 272 U. S. 658, 71 Law Ed. 463, Justice Brandeis in his opinion in a case in which an injunction was sought against an order of the Interstate Commerce Commission, stressed the necessity for such findings and

⁴ Sec. 15, Ch. 1, Title 49, U. S. C. A., as amended in 1920, expressly gives I. C. C. power to prescribe joint rates for railroads and to establish just divisions of joint rates. The Packers and Stockyards Act, 1921, does not contain such a provision.

criticized the lower court for its failure in that respect in the following language on page 472 of the Law Edition:

"In view of the importance of the litigation, we interpret the absence of findings as tantamount to a declaration that, upon careful scrutiny of the record, the questions presented for judicial determination appeared to be simple, or, at all events, that the case did not involve the determination of any questions of law which were novel or as to which there was or could be reasonable doubt. Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true where the case is in equity and the decree is entered upon a hearing involving complicated facts."

And in *Hammond v. Schappi*, 275 U. S. 165, 171, 72 Law Ed. 219, at page 221, the court said:

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could not be
184 made with confidence. * * * Before any of the questions suggested which are both novel and of far-reaching importance are passed upon by this court, the facts should be definitely found by the lower courts upon adequate evidence"

And in *Railway Commission Company v. Maxey*, 281 U. S. 82, 74 Law Ed. 717, the court had under consideration the action by a statutory court in enjoining the enforcement of a rate order of the Railway Commission of Wisconsin. The trial court "gave no opinion and aside from the general recital in the decree that the court had considered the evidence submitted by the parties and that it appeared therefrom that the valuation fixed by the Commission of the property of the company for rate-making purposes was not supported, the record contained no findings whatever by the district court." Because of this inadequacy and insufficiency of and in the findings, the Supreme Court reversed and remanded the case with instructions to make such findings.

Specific as Well as General Issues Should Be Considered in Opinion

The court in the opinion of Judge Otis makes three findings which are denominated "findings of fact" and three findings which are denominated "conclusions of law." In many respects the findings of fact and the conclusions of law are couched in the same or in substantially the same language and are substantially the same findings. One of the findings, both of law and of fact, is devoted to the question of whether proper procedure was followed by the Secretary in the conduct of the hearings before him. This question was not before the court at the hearing on the merits for the reason that it had been eliminated therefrom by the action of this court in sustaining de-

fendant's motion to strike the portion of plaintiff's petition in which this question was raised. The other two findings of law and fact are merely broad and general statements to the effect that the findings of the Secretary are supported by substantial evidence, are not based upon erroneous rules of law, that the prescribed rates are not confiscatory and that the court adopts by reference as its findings of fact all of the findings of fact as made by said Secretary in said order.

It will be observed upon examining plaintiff's petition that
185 although the challenges made therein to the findings and order fall into the four major headings into which they have been classified by the court in the main opinion, that each of these headings is composed of numerous subdivisions. Aside from the question of procedure which, as above stated, is not in this case at this time, the principal issues raised by plaintiff's petition are those covered by the allegations contained in Sections V, VI, VII and VIII, respectively, thereof. Section V contains four subdivisions, Sections VI and VII six each, and Section VIII contains five subdivisions. Except as to the subdivisions contained in Section VII, which will be considered and discussed elsewhere herein, the court does not comment upon and makes no findings in respect of the allegations contained in any of these subdivisions.

Answer Admits Many Challenges in Petition to Findings of Secretary

At the bottom of page 7 of the main opinion, the court stated that it finds in the record "substantial testimony to support every challenged finding." This language is misleading and confusing, to say the least, in view of the fact that defendant's answer expressly admits certain of the findings challenged by plaintiff in his petition and that other allegations contained in the answer amount in law to an admission of the allegations contained in other parts of plaintiff's petition. The answer consists principally of general denials instead of the specific denials required by equity practice. These general denials were practically abandoned by the defendant at the oral argument and in the presentation of the case by brief. There are many allegations in the answer to the effect that defendants do not know whether the allegations contained in plaintiff's petition are true or not; but whether they are true or not "is immaterial and irrelevant." In advance of the hearing on the merits, the court had overruled defendant's motion to strike out as immaterial or irrelevant some of the allegations contained in plaintiff's petition, and when defendants filed their answer they again raised therein the same questions of relevancy and materiality concerning the petition as had been raised under said motion to strike. A reference to Section VIII of the petition and to the answer thereto will fully illustrate the defective character of the answer and the narrowing effect which the answer had upon the allegations contained in plaintiff's petition.

186 The Court Failed to Determine These Important Issues of Relevancy and Materiality Presented by Pleadings

Which of the challenges made by the plaintiff to the findings and order, whether these challenges be admitted by the answer or otherwise, are deemed by this court to be irrelevant and which are regarded as being material and relevant?

Decline in Gross and Net Income

Is it material that contrary to statements contained in the order of the Secretary the net income to each of the market agencies operating upon the Kansas City market was less in 1931 than it was in 1929 because of the decline in gross income of these agencies and of their inability to reduce proportionately their operating expenses, or that the gross income of these agencies continued to decline both in 1932 and in 1933?

Rapidity of Required Performance Destroys Efficiency

Is it material that the standards of performance for salesmen as prescribed in the order, even if attainable, would, if attained, cause serious losses to the producers of livestock patronizing the public market at Kansas City through reduction in efficiency of marketing agencies, and that this would in and of itself constitute a violation of certain provisions of the Packers and Stockyards Act?

Necessary Advertising and Other Costs Eliminated

187 Is it material that much of the expense of these agencies, which the Secretary classified as advertising and which he found to be unnecessary, represented costs actually sustained by these agencies for selling and buying services essential in carrying out the normal and necessary functions of their businesses?

Competition of Other Markets and Packers Ignored

Is it material that the competitive efforts of other agencies operating at other public markets, and of the packers in their direct-buying activities are shown by all the evidence to justify these agencies in spending more rather than less for business getting and maintaining?

Value of Service Not Considered

Is it material that the Secretary failed to give consideration to the value of the service rendered by these agencies to their patrons, the producers of livestock?

*Sec. 192, Ch. 9, Title 7, U. S. C. A.:

"It shall be unlawful for any packer to:

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce."

Rates Less Than Charges for Handling Any Other Farm Product

Is it relevant that the commissions received by these agencies at the time the rates were placed under investigation by the Secretary were less in proportion to the net sales proceeds of livestock handled by them than they were when these agencies received a far greater volume of livestock, or that the rates received by these agencies for their services were less than the charges made by similar agencies for performing like services in selling any other agricultural product?

Secretary Disallows Actual Costs Which He Caused Agencies to Sustain

Is it material that even though it is admitted by the defendants in their answer that the Secretary does not have the power to determine the number of agencies required to properly handle the volume of livestock coming upon the public market at Kansas City, yet he purports to fix rates so low as to drive agencies and their personnel out of business, or that he failed to give consideration to the undisputed testimony that he had been directly responsible for increasing the number of agencies at Kansas City and had assisted cooperative agencies in obtaining business which would otherwise have gone to these plaintiff agencies, or that he encouraged these competitors to incur the identical kinds of expense which he refused to allow these plaintiffs as reasonable costs in the present case?

Appraised Value of Owner's Services Ignored

Is it material that the Secretary refused to consider the evidence offered by these agencies showing the appraised value of the owner-worker services to their respective businesses?

Improper Classification of Costs

Is it material as to whether there was any basis under the evidence to justify the Secretary in classifying the costs of these agencies into those as to which the conditions of the business tend to keep down and those which the conditions of the business tend to increase?

Cost Tables Mathematically Inaccurate

Is it material that the alleged typical functional unit costs as allowed by the Secretary understate the amount of these costs because the unit cost tables upon which these typical costs were based were in and of themselves incorrect and in practically every instance wholly at variance with the unit cost tables put in evidence by his own accountant?

Costs Erroneously Assembled

Is it material that in assembling total unit costs for all functions the Secretary disregarded the relationship between different functions in that comparatively high costs in individual agencies for one function may necessarily result in a lower cost for another function?

Not One of Fifty Agencies Can Meet Costs on Agencies' Showing

Is it material that if the prescribed rates had been applied to the business of the several plaintiffs in the test year of 1931 that not one of them would have had enough gross revenue from his business to cover his total calculable costs incurred in rendering stockyard services during that year, and that because of the continued decrease in the volume of business in 1932 and 1933, the confiscatory character of the order would have been exaggerated if applied to these later years?

189 Twenty Largest Agencies Have Deficit on Government's Own Showing

Is it material that on the basis of the costs as recognized by the government's chief accountant, that if the ordered rates had been applied to the 1931 business of these agencies, these rates would not have provided a sufficient revenue to these several plaintiffs to enable them to meet such costs, and that on this basis, the twenty largest agencies would have an operating deficit, exclusive of any return on their invested capital and exclusive of any compensation to them as owners for their personal services?

Eleven Largest Agencies Have Deficit on Government's Showing

Is it material that on the basis of the costs as recognized by the government accountants, and exclusive of any compensation to the owners for their personal services, that said ordered rates, if applied to the 11 agencies who handled in 1931 more than 50% of the total volume of livestock handled at the Kansas City market during that year, would have lacked approximately \$20,000.00 of providing the allowance by way of return on capital specified in the order and that as to 23 agencies which handled more than 75% of the total business at this market in 1931 the owners thereof would have received, under such rates, in 1931 no compensation whatever for their personal services and a return on capital invested of only 60% of the amount of the return as found reasonable by the Secretary?

Out-of-Pocket Expense Greater Than Yield of Rates

Is it material that the out-of-pocket expenses paid by an individual petitioner in good faith (exclusive of any return or compen-

sation to owners) amounted to more during the test year than the gross yield of rates ordered into effect by the Secretary?

Materiality of this Evidence Undetermined

These are the issues presented directly by the petition and answer. The opinion does not answer these questions. It should be clarified so that petitioners would have some guide to follow in the
190 future. Proceedings of this character are very costly under the best of circumstances to both petitioner and Secretary.

Further Findings Should Be Made

We are unable to tell from the opinions in this case whether the court failed to discuss these challenges of plaintiff to the findings and order of the Secretary because of an oversight or because the court deemed such challenges irrelevant and immaterial. It is possible that, because of the factors prescribed by the court in the main opinion for rate making and which have been previously discussed herein, the court considers many of these challenges immaterial. Even if that be true, the work of the litigants and of the higher court in the event of an appeal will be simplified and made more effective if all of these challenges are discussed and findings are made thereon. We realize the burden that will devolve upon this court or counsel in making complete findings in the separate and distinct cases now pending before it, but it is submitted that this is necessary, particularly in view of the fact that, in each and every one of these cases, the issue of confiscation is raised. Each petitioner sustained a great burden in placing himself in a position to produce before the court the specific facts relative to the effect of the rates on his particular business. The raising of this issue requires the determination by the court of the effect of the ordered rates upon each and every one of these plaintiffs.

This point, we believe, is admitted by defendants in their brief filed in this case. At page 8 of that brief, the following language appears:

"The only questions of fact bearing upon the question of confiscation are those put in issue by Section VIII of the petitions. They relate solely to the effect which the order would have had upon the business of petitioners if it had been applied to the 1931, 1932, and 1933 business. *These questions are not covered in the Secretary's findings and allegations with respect thereto have been denied in the answer upon information and belief. If this court deems the questions raised by Section VIII of the Petitions to be relevant, then it will have to make an independent determination of the facts in issue under that section on the basis of the evidence is submitted directly to this court at the final hearing.*" [Italics ours.]

191 In the opinion, there is no special or general finding by the court as to the effect of the ordered rates upon the business of

any of the plaintiffs, either for the year 1931 or for the years 1932 and 1933. The court only finds that the rates are not confiscatory as to any plaintiff. No findings are made upon which that conclusion can properly be based. The ordered rates affect each plaintiff differently. These differences will be disclosed if separate findings are made.

Court Improperly Adopted "In Toto" Findings of Secretary

The findings of the Secretary covered 180 separate and distinct paragraphs. Many of these findings were not challenged and were not in issue before the court; many of the other findings were challenged and were in issue before the court. These findings consist not only of findings of fact, but also of findings of law and of mixed findings of fact and law. Such findings are intermingled and intermixed, and the action of the court in adopting as its findings those "findings of fact" made by the Secretary, without pointing out which findings were adopted, leaves it uncertain to everyone concerned as to just what findings made by the Secretary the court actually adopted. The effect of the adoption of the findings of the Secretary by the court is to leave many of the issues exactly where the court found them. It has not by the opinion narrowed or clarified the issues or established any guide by which the parties litigant may know what issues the court actually passed upon and what issues the court did not pass upon, or what issues the court deemed relevant and what issues the court deemed irrelevant.

Court Improperly Construed Issues Presented By Subdivision (a) of Section VII of Petition

On pages 8, 9, and 10 of the main opinion, the court discusses Section VII of the petition. This section challenges the order of the Secretary on the ground that it is based on erroneous conceptions of established rules of law in the particulars set forth in the various subdivisions of that section.

In discussing Subdivision (a) of this section, the court says that the error claimed therein by the plaintiff was that the costs denominated reasonable costs by the Secretary were arrived at arbitrarily and in disregard of the evidence, and that petitioner again raises in this section practically the identical issues presented in preceding sections of the petition. It is manifest that the court has failed to correctly grasp the legal effect and purport of the allegations made in this subdivision. This subdivision challenges the method employed by the Secretary in assembling the data from the evidence before him and upon which data he based his functional unit cost allowance. It also questions the method employed by the Secretary in the reintegration of those functional unit costs into an aggregate unit cost to be covered into the rates which the order establishes.

The order classifies expenses incurred by these agencies into two classes: "First, those which the conditions of the business tend to hold down; and, second, those which the conditions tends to increase." As to the expenses of the first class, the order purports to ascertain the typical cost as distinguished from the hypothetical cost on a unit basis which he develops in his allowances for expenses of the second class. The error complained of relates particularly to Paragraphs 114 to 149, inclusive, of the order and to the tables of alleged individual functional unit costs as set forth in these paragraphs. Here the order purports to find a reasonable per head per species cost for each of eleven separate functions out of the total of all functions into which the Secretary has divided the business of plaintiff. The cost for these eleven functions the Secretary believes "the conditions of the business tend to hold down."

Petition Questions Methods Employed by Secretary in Finding Separate Functional Unit Costs and in Finding Total Functional Unit Costs

The various tables set forth under these paragraphs purport to show the per head cost for the various agencies for each of these eleven functions in accordance with their actual experience as developed by the Secretary's accountants, after, however, deducting therefrom such portion of the actually experienced costs for each of these functions as were deemed applicable to those of the agency personnel whose entire time was not solely devoted to any one of these eleven functions. It was the exception and not the rule 193' when an employee devoted his entire time exclusively to a particular function. Most of the personnel of each agency worked from day to day and from week to week at more than one or at all of these functions. As in a law office, the employee usually does any type of work, in or out of the office, that comes to hand. Accountants both for the agencies and the government in their testimony before the Secretary stated that it was not possible to accurately allocate to these particular functions the entire cost incurred with respect to these functions. This was because the data for this purpose was not at hand. While total costs were ascertainable as to each agency for all functions, total costs were not accurately ascertainable for particular functions. It was found from the evidence, for example, how many head of livestock of a given species were yarded by a particular agency during a particular period of time by all hands connected with the agency. The evidence also showed fairly well how much was paid for the yarding of this species by the limited number of employees whose entire time was devoted to nothing else except the yarding of this particular species. In developing these unit cost tables, the order divides the number of individual species of livestock of each class yarded by the individual agency into the total amount paid to the relatively few paid em-

ployees who were solely employed in that particular service during the period under consideration. This is then set out in these tables as the actual per head unit cost of that agency for yarding that species of livestock. This is so obviously an incorrect method of determining the unit cost per head of that function for any agency that there is no necessity for argument or dispute about it when the method employed is actually understood.

Improper Method of Computation Used

This is not a matter of arbitrarily ignoring evidence. It constitutes the employment of an unsound method of computing these costs from the expenses shown in evidence. There is no question but that this is just what the order does. If the Secretary desired to arrive at a correct statement of individual costs for such a function as yarding by those men whose entire time was devoted to yarding, he should have deducted from the total livestock handled by all of the personnel of the particular agency the total number 194 yarded by those whose entire time was not devoted to that function. With this deduction made, he could have determined the cost per head for yarding a given species of livestock by those employees of any agency whose time was devoted entirely to yarding. If he were unable to do this, he should have employed a different method of ascertaining what the actual functional unit costs were. Upon the basis of individual costs for a function so incorrectly stated, a judgment is then reached by the Secretary as to what constitutes a normal or typical cost for that function. It is stated in the order that this normal or typical unit cost was selected according to judgment as, a reasonable cost for the particular function because it was around the unit figure at which the experience of many of the individual agencies appeared "to cluster."

Cost Tables Inaccurate and Misleading

The tables are not what they purport to be. It was upon these tables that the Secretary relied exclusively to inform his judgment as to what the normal or typical costs were. It is perfectly apparent that typical costs, based on these tables, understate the typicality of the costs so found. It is reasonable to suppose and believe that, had these tables been true and correct, the Secretary would have allowed substantially higher unit costs for these various functions than those which he did allow in the order. It is not possible to determine accurately what the difference in result would have been had the Secretary used proper methods in compiling the data set forth in these tables except when we measure its effect upon the aggregate cost. We do know that functional costs so incorrectly found covered eleven of the important functions of the business of these agencies. It is plaintiff's contention, therefore, that the methods employed by the

Secretary in determining his allowance of unit costs for these eleven functions were arbitrary, unreasonable and void as a matter of law. It is just as unreasonable and improper as it would be in mathematics to undertake to find one-third of nine by dividing by two.

The Secretary then proceeds to reintegrate his allowed functional costs by adding together the amount allowed by him for each of these eleven functions. His action in so doing is also challenged by this subdivision of Section VII of the petition. It is manifest that where the above complained of errors were committed in the allocation and distribution of costs to functions and in the allowances made by him for such functions, that this method of reintegration necessarily produces an arbitrary and incorrect result. The method employed by the Secretary in the reintegration of the costs eliminates the possibility that an underallowance of cost for one function may be compensated by an overallowance of cost for another function. The method of reintegration, moreover, loses sight of the facts as disclosed by the evidence that a comparatively high cost experienced by a particular agency for a particular function may result in a comparatively low cost for another function by the same agency. The evidence showed, for example, that firms having comparatively high costs classified as business-getting and maintaining costs had relatively low selling costs. (See Chart, Petitioners' Exhibit 11, John W. Roberts, which was placed in evidence before this court.) In other words, the method of reintegration employed leaves entirely out of consideration the relationship between the different functions. It is, therefore, submitted, as stated in plaintiff's petition, that the order is unreasonable and arbitrary as a matter of law. The question as to whether the Secretary had a right to do what he did, or employ the methods he did employ, is a question of law and was properly challenged in the petition as being the application of the erroneous rule of law.

Court Should Set Aside Order Where Improper Methods of Rate Making Are Employed

It was contended by counsel for the government that the courts have no right to criticize methods of rate making employed by rate-making authorities, provided the results obtained are not objectionable. We submit, however, that the courts have never said that they have no right to enjoin an order in which the rate-making methods employed were obviously arbitrary, unfair and unreasonable in and of themselves. As night follows day, such a method would manifestly produce an unfair and unreasonable result. The court clearly has the right to determine from the methods employed by the rate-making authority whether the exercise of that authority "has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow

determines the validity of the exercise of that power." (Interstate Commerce Comm. v. Ill. Central R. R. Co., 215 U. S. 452, 470, 54 L. Ed. 280, 288.)

When we undertook to question at the hearing before the court the methods employed by the Secretary in the present case in his rate-making processes, the government immediately sought refuge under the decision of the court in the Omaha case, on the basis that the court had approved the methods employed in that case. But the methods there employed and the results obtained were very different. The courts have repeatedly considered the methods employed by *rate-making bodies* in carrying out their rate-making functions and have enjoined and set aside orders in which unfair, arbitrary and unreasonable methods were used. Thus, in *Wood v. Vandalia*, 231 U. S. 1, 58 Law Ed. 97, at page 100 of the Law Edition, the court said:

"In these circumstances the ratio of total expense to total earnings affords in itself no sufficient basis for determining the costs of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the Commission that the existing rates were exorbitant and that the substituted rates would be fair. Before such a ratio could be properly used in setting forth the cost of the specified portion of either justifying the conclusion that the cost, in proportion to the revenue, was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent."

"In defending the use of the method adopted below, appellee relies upon the case of *Smythe v. Ames*, 169 U. S. 466, 42 Law Ed. 819

* * * It is sufficient to say that the case cited cannot be regarded as affording basis for contention that a ratio of expense to earnings on the entire business of a railroad or of a division, can be taken to show the cost of some particular item or class of traffic in the absence of evidence with respect to that traffic which would warrant the conclusion that its cost in proportion to the revenue therefrom could properly be expressed."

And in *Chicago, Milwaukee, etc., Rwy. Co. v. Commission*, 274 U. S. 344, 71 Law Ed. 1085, at page 1090 of the Law Edition, the court said:

197 "This case is in principle the same as *Northern P. R. Co. v. Dept. of Public Works*, 268 U. S. 39, 43, 69 Law Ed. 836, 840.

That case involved the validity of an order of the Washington Department of Public Works reducing the intrastate log rates. The carriers assailed them as confiscatory and introduced persuasive evidence that the rates existing before the reduction were not sufficient to pay operating expenses and taxes. The Department, without attacking the proof or attempting to show by reasonably specific and direct evidence what the actual operating costs were, lowered the rates on the basis

of a composite figure representing the weighted average operating cost per thousand gross ton miles on all revenue freight carried on the railroad system. We applied the rule (page 44) that, where rates found by a regulatory body to be compensatory are attacked as being confiscatory, the court may inquire into the method by which its conclusion was reached. Cf. *U. S. v. Abilene and S. R. Co.*, 265 U. S. 274, 288, 68 Law Ed. 1016, 1022; *Chicago Junction Case* (*Balt. & O. R. R. Co. v. U. S.*), 264 U. S. 258, 263, 68 Law Ed. 667, 673; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, 547, 56 Law Ed. 308, 311, and we held that the method pursued by the Department was fundamentally erroneous and constituted a denial of due process of law."

See also, *Great Northern Utilities Co. v. Commission*, 52 Federal (2d) 802, 805; *Beaumont S. L., etc., Rwy. Co. v. U. S.*, 282 U. S. 74, 86, 87, 75 Law Ed. 221, 230, 231; *Missouri Rate Cases*, 230 U. S. 474, 501, 506, 57 Law Ed. 1571, 1592, 1593.

Conclusion

As suggested in the separate concurring opinion of Judge Arba S. Van Valkenburgh, the order has already imposed great hardship upon the individual petitioners and their employees. Most of these men have devoted almost a lifetime to the honorable and useful calling in which they are engaged. The conditions of operation specifically required to meet the effect of the order demand, and, in fact, compel, lowered efficiency. This, in turn, causes loss of business to other markets and agencies engaged in other methods of marketing and means eventual disintegration. Under the best of circumstances the receipts of livestock will be greatly reduced at the Kansas City Market. In other words, to use the language of Justice Cardozo, in *Hegeman Farms Co. v. Baldwin*, *supra*, the petitioners "must break the law or bleed to death" and there is "no outlet of escape." These being maximum, not minimum, rates, the order attacked comes within the description by Justice Cardozo in that case as an "act of tyrannical compulsion" reviewable by courts as a matter of right. Can the Secretary be expected to relent as the separate opinion suggests—or is this court to exercise the power granted it by the Packers and Stockyards Act, 1921, and the Constitution, to review his order?

For all of the above reasons plaintiff respectfully requests a rehearing be granted in these several cases to the end that the opinion may be reconsidered and changed and modified to the extent and in the manner that seems meet and proper to the court.

Respectfully submitted.

JOHN B. GAGE,
CARSON E. COWHERD,
Attorneys for Plaintiff.

Appendix to Petition for Rehearing

In the District Court of the United States for the Western District
of Missouri, Western Division

In Equity

No. 2328 (and Related Cases Nos. 2329 to 2378)

W. O. MORGAN, DOING BUSINESS AS W. O. MORGAN SHEEP COMMISSION
COMPANY, PETITIONER

vs.

UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after 199 final hearing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges or services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme Court (*Tagg Bros. v. United States*, 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

Sec. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency,

for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act of the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6,721 typewritten pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an "Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3,091 typewritten pages in addition to which 111 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." Thereafter, on June 14, 1933, the Secretary of Agriculture made and issued findings of fact and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock, bought or sold, the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 1 to 20 head, and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned and the petitioners have made all of them save one. They are: (1) that the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that erroneous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros. v. United States, supra*; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 454.

The Procedure

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." Sec. 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate the obvious observation that the theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

Findings Support Order

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that these findings support the order. Unquestionably they do support the order and that fully.

Findings Supported by Evidence

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City Stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the effi-

cient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive, if the evidence before him was legally sufficient to maintain them." *Tagg Bros. v. United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings. That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

Claimed Errors of Law

It is true that such an order as the one here attacked must
203 be set aside if it rests upon an erroneous rule of law. *Tagg*

Bros. v. United States, 280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following.

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying

an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not that they had cost) \$66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is
204 free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

Confiscation

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court never has finally been decided by the Supreme Court. *Tagg Bros. v. United States*, 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company v. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679, 689; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 50; *Lehigh Valley R. Co. v. Board*.

of Public Utility Com., 278 U. S. 24, 36; United Railways & Electric Co. v. West, 289 U. S. 234, 251; Phillips v. Commissioner, 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers and Stockyard Act refers and by United States v. Louisville and N. R. Co., 235 U. S. 314, 320; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541, 547, and the dissenting opinion in Ohio Valley Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 297, as well as by the declination of the Supreme Court to pass upon the matter in Tagg Bros v. United States, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. Darnell v. Edwards, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for costs, and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings, then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital and 7% on working capital, as a matter of law, is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases, only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence, but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are

efficiently conducted, the issue of confiscation must be resolved against the petitioners.

Other Matters

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

Findings of Fact

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the court at the trial of these cases, the Court adopts as its findings of fact the findings of fact made by the Secretary and by reference incorporates them herein.

Conclusions of Law

The Court concludes as matters of law—

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

Indicated Decree

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

In the District Court of the United States for the Western Division
of the Western District of Missouri

In Equity. No. 2328

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP
COMMISSION COMPANY, ET AL., PETITIONERS

vs.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?
- 208 2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically conceded, the insistence being that the Secretary's allowance of costs is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer, in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for

this purpose. Capable men cannot be picked up will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring and the service they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making his market. This applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of record and briefs indicates that in various ways 200 the agencies have striven to keep costs down. Obviously it was to their interest to do so in years lean at the best. Their judgment as to their necessities should not be lightly set aside or underestimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal trade territory. The market agencies have to compete with other stock markets, with co-operatives, a percentage of whose profits go back to their members, with packers, and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most valuable operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

210 My reaction to the presentation made is that I should have made a more liberal allowance for costs and owner return—not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and provided, further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as “a tribunal appointed by law and informed by experience.” And we are forbidden to question the soundness of the reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

212

In United States District Court

In Equity. No. 2328

[Title omitted.]

Order granting leave to file petition for rehearing

Filed January 2, 1935

On motion of plaintiff for leave to file herein a petition for rehearing, a copy of which petition, together with plaintiff's memorandum in support thereof, is attached hereto, leave is hereby granted plaintiff to file said petition.

In the meantime, and until further order of this Court, let all proceedings under the Decree in said cause be stayed.

ARRA S. VAN VALKENBURGH,
Circuit Judge.

ALBERT L. REEVES,
MERRILL E. OTIS, *District Judges.*

To the CLERK OF THIS COURT:

Let the above Order be entered in identical form in each of the related cases docketed as In Equity Nos. 2329 to 2378, inclusive.

ARRA S. VAN VALKENBURGH,
Circuit Judge.

ALBERT L. REEVES,
MERRILL E. OTIS, *District Judges.*

[File endorsement omitted.]

In United States District Court

In Equity. No. 2328 (and Related Cases Numbered 2329 to 2378, Inclusive)

[Title omitted.]

Stipulation as to consolidation

Filed June 15, 1935

At appearing to counsel for the respective petitioners and defendants in the above entitled causes that many of the issues presented in the respective pleadings in each of said causes are common and present in each of said causes the same questions of law and fact, and that it will serve the convenience of Court and counsel if said causes be consolidated for the purpose of trial, presentation, and further proceedings therein,

213 It is Hereby Stipulated and Agreed by and between the parties hereto that the Court may enter a suitable order of consolidation of the said causes for the purpose of trial, presentation, and further proceedings. It is understood and agreed by the parties hereto that such order of consolidation may be entered solely to serve the convenience of Court and counsel and that such order shall not prejudice in any manner the right of petitioners and each of them to several and individual presentation, consideration, and determination, by any Court having occasion to pass upon the issues herein, of such of the issues in each of said causes as are several in character and individual to each separate action.

JOHN B. GAGE,
Counsel for Petitioners.

HAROLD W. STEPHENS,
Counsel for Respondents.

June 15, 1935.

[File endorsement omitted.]

In United States District Court

In Equity. No. 2328 (and Related Cases Numbered 2329 to 2378,
Inclusive)

[Title omitted.]

Order consolidating causes

Filed June 15, 1935

Pursuant to stipulation of counsel for all parties, dated June 15, 1935, which has been filed herein, it is hereby ordered that each of the causes covered by said stipulation, the same being in equity numbered 2328 to 2378 inclusive, shall be and the same hereby are consolidated for the purpose of trial presentation and all further proceedings herein.

ARRA S. VAN VALKENBURGH,
United States Circuit Judge.

ALBERT L. REEVES,
United States District Judge.

MERRILL E. OTIS,
United States District Judge.

[File endorsement omitted.]

214

In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-2378, Inc.

[Title omitted.]

Order denying petitions for rehearing and entering joint and final decree in cases as consolidated

Filed June 20, 1935

The petition for rehearing, filed by plaintiffs herein by leave of Court, having been presented to the Court pursuant to the Order to Show Cause directed to the defendants herein by oral arguments and briefs of counsel for both parties, and the Court being fully advised in the premises,

It is Hereby Ordered and Adjudged by the Court, in accordance with the views expressed in the opinion of the Court, that said rehearing be not granted and the petitions for rehearing should be, and the same hereby are, denied. Exceptions are allowed to the Order of the Court denying said petitions for rehearing.

And it further appearing to the Court that by order of the Court pursuant to stipulation of counsel for all parties, the above cause and related cases bearing Docket Nos. 2329-2378, inclusive, have been consolidated for the purpose of trial presentation and all further proceedings therein and that separate decrees entered in each of said cases as of the 20th day of December, 1934, should be set aside and withdrawn

and a joint decree, in accordance with the views heretofore expressed in the opinion of the Court, be entered as of this date in the cases as consolidated in lieu of said separate decrees to constitute the finding and judgment of this Court.

It is, Therefore, Ordered, Adjudged, and Decreed that the separate decrees entered in each of said cases as of the 20th day of December, 1934, be, and the same are hereby, set aside and withdrawn and that the following order, judgment, and decree be substituted therefor in accordance with the views expressed in the opinion of the Court:

That the petitions heretofore filed by the petitioners be, and the same are, hereby dismissed at the respective cost of each of said petitioners and that the temporary restraining orders heretofore granted be, and the same are hereby, dissolved and set aside.

215 It is further ordered that petitioners, and each of them, shall within sixty (60) days from the date hereof, refund, or cause to be refunded by the Clerk of this Court to the users of petitioners' services that portion of the rates and charges collected by petitioners since the 24th day of July, 1933, which is in excess of the maximum rates and charges prescribed as reasonable in the Order of the Secretary of Agriculture dated June 14, 1933, which excess amounts have been deposited with the Clerk of this Court each week during the period since the temporary restraining order was granted, and that petitioners shall as soon as possible after the expiration of sixty days from the date of this Order file with this Court under oath a true and accurate account of the amounts so refunded, together with the names and addresses of the persons to whom refunds have been made, and also the names and addresses of persons to whom refunds are due but to whom payment has not been made, and the reasons therefor, together with a sworn statement to the effect that such account covers all the refunds which petitioners are obligated to make under the terms of this Order.

Exceptions are allowed to the findings, conclusions, and decree of this Court.

And the Court being advised of the intention of the plaintiffs herein to prosecute an appeal to the Supreme Court of the United States, does, in order to avoid irreparable damage to plaintiffs, suspend and stay execution upon the judgment herein entered for a period not in excess of the time allowed by law for presenting a petition for appeal herein, upon the condition, however, that the requirement for impounding set forth in the temporary injunctions granted herein shall be complied with by plaintiffs and each of them pending the application for and the allowance of such appeal.

Dated this 20th day of June 1935.

ARBA S. VAN VALKENBURGH,

Circuit Judge.

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

[File endorsement omitted.]

Mandate of Supreme Court

Filed June 4, 1936

UNITED STATES OF AMERICA, ss:

{SEAL}

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Western District of Missouri, Greeting:

Whereas lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in causes between F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company et al., Petitioners, and The United States of America and The Secretary of Agriculture, Defendants, in equity, No. 2328 (and relates cases Nos. 2329-2378, Inc.), wherein the Final decree of the said District Court dismissing the petitions and dissolving the temporary restraining orders was duly entered in said causes on the 20th day of June, A. D. 1935, which decree is fully set out in the record of said causes in the office of the clerk of said District Court and is incorporated herein by reference thereto;

As by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal sued out by F. O. Morgan, Doing Business as F. O. Morgan Sheep Commission Company et al., agreeably to the Act of Congress, in such case made and provided fully and at large appears.

And Whereas in the present term of October, A. D., 1935, the following order was entered of record:

"On Consideration of the motion of counsel for the New Amsterdam Casualty Company that the said Casualty Company be substituted as a party appellant in this cause in the place and stead of Harry J. Kennaley, doing business as Harry Kennaley Commission Company, the plaintiff in case No. 2356 on the docket of the District Court of the United States for the Western District of Missouri;

It Is Ordered by this Court that the said motion be, and the same is hereby granted, and that the New Amsterdam Casualty Company be, and it is hereby, substituted as a party appellant herein in the place and stead of Harry J. Kennaley.

June 1, 1936."

And Whereas in the present term of October, in the year of our Lord one thousand nine hundred and thirty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration whereof: It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed.

And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

MAY 25, 1936.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and thirty-six.

[SEAL]

[Signed] CHARLES ELMORE CROPLEY,

Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Supplemental answer

Filed July 11, 1936

Come now the defendants in the above entitled cause and answer the allegations of Paragraph IV of the petitions, as follows:

218 1. Answering subparagraph (a) of Paragraph IV, defendants admit that the Secretary overruled and denied the request of each petitioner for a separate, individual, and independent hearing apart from any other of the respondents named in the notice of inquiry, but defendants deny that any of the petitioners was prejudiced thereby.

2. Answering subparagraph (b) of Paragraph IV, defendants admit that at the conclusion of the hearings held before the Examiner counsel for petitioners requested that the Examiner prepare a tentative report upon the evidence to be presented to the petitioners and the Secretary subject to oral argument as to any exceptions thereto which the petitioners might care to present and that such request was denied and no tentative report was exhibited to petitioner prior to oral argument. Answering the allegation that no oral argument upon the issues presented by the order of inquiry and the evidence taken by the Examiner was at any time had before the Secretary, defendants say that on March 24, 1933, oral argument was had before the Acting Secretary of Agriculture and that petitioners' counsel was present at such time and made a lengthy oral argument, and that petitioners' counsel made no objection at such time to the adequacy of the opportunity given for oral argument.

3. Answering subparagraph (c) of Paragraph IV, with respect to the allegation that at the time when oral arguments were presented,

the Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and was neither sick, absent, nor from any other cause disabled in the performance of official duties, while defendants say that such allegation is irrelevant and immaterial as a matter of law, they nevertheless admit the facts therein alleged. Defendants deny each and every other allegation contained in said subparagraph (c). Defendants further say that the oral argument which was had on March 24, 1933, before Acting Secretary Tugwell was reduced to writing and transmitted to the Secretary of Agriculture, and that counsel for petitioners also filed with the Secretary a printed brief.

4. Answering subparagraph (d) of Paragraph IV, defendants admit that the Secretary of Agriculture did not personally hear oral arguments, otherwise defendants deny each and every allegation contained therein.

5. Except as herein expressly admitted, defendants deny each and every allegation contained in Paragraph IV.

Wherefore, having fully answered herein the allegations of said Paragraph IV, and having fully answered all of the other paragraphs (sections) of the petitions in the answer filed November 23, 1933, defendants pray that the petitions be dismissed.

Maurice M. Milligan, United States Attorney; Wendell Berge, Special Assistant to the Attorney General; John Dickinson, Assistant Attorney General; G. N. Daigger, Attorney, Department of Agriculture.

On this 11th day of July, 1936, leave is by the court granted to defendants to file the within supplemental answer.

(Signed) MERRILL E. OTIS, Judge.

[File endorsement omitted.]

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Amended application of petitioners for leave to amend petitions

Filed September 17, 1936

Come now petitioners in each of the above cases and respectfully request the Court for leave to amend by interlineation the petitions filed herein by striking out all of Section IV thereof and substituting therefor, by interlineation, the following:

"IV"

Petitioner alleges that petitioner was denied and failed to receive, although duly demanded, a full hearing upon the matters and things

set forth in said Order of Inquiry, or any of them, and that it has not been accorded the full hearing to which it is entitled under the provisions of the Packers and Stock Yards Act of 1921 and
220 under the Fifth Amendment to the Constitution of the United States, and that by reason thereof the order of the Secretary of Agriculture made herein on June 14, 1933, is null and void as not being in compliance with said statute and would if enforced deprive petitioner of its liberty and property without due process of law; that petitioner has been deprived of the full hearing to which it is entitled as aforesaid, by reason of the following matters and things, as to each of which petitioner alleges that it constitutes in and of itself and together with any other or others thereof, a denial of the full hearing to which petitioner is entitled by virtue of said statute and the Fifth Amendment to the Constitution of the United States, and petitioner expressly demands that the defendants make separate and explicit answer to each of the matters and things hereinafter set forth, irrespective of whether or not it be alleged in a separate lettered paragraph:

(a) Henry A. Wallace, the Secretary of Agriculture, who made and signed the order of June 14, 1933, herein was not personally present when any of the testimony herein was taken and did not hear any of said testimony given, nor, on information and belief, was such testimony, or any of it, read to or by him, either the testimony offered by the petitioner or by the defendants.

(b) All of the testimony taken in the administrative proceeding herein was heard by John C. Brooke, an examiner of the Department of Agriculture. The petitioner offered the testimony of sixty-six witnesses. The respondents offered the testimony of forty-four witnesses. As to the testimony of each one of these witnesses, the petitioner alleges on information and belief that the Secretary neither heard it nor read it, nor had it read to him, nor read or examined any fair or adequate abstract, analysis or synopsis thereof.

(c) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(d) As to the testimony of each of the aforesaid witnesses, the petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(e) In the course of the administrative hearings before Examiner Brooks, the petitioner introduced one hundred thirty
221 exhibits and the respondents introduced three hundred eighty-six. Petitioner alleges on information and belief as to each of these exhibits that the Secretary did not read it, did not have it read to him, nor did he read any fair or adequate abstract, analysis, or synopsis thereof.

(f) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not examine or consider the same.

(g) As to each of said exhibits petitioner alleges on information and belief that the Secretary did not judicially appraise the same.

(h) At the conclusion of said administrative hearings before said examiner, petitioner demanded that the Secretary personally hear oral argument on its behalf. The Secretary failed and refused to hear oral argument.

(i) On or about the 25th day of May, 1933, petitioner submitted a brief on the law and facts involved in said administrative hearings with the demand that the Secretary read and consider the same. Petitioner alleges on information and belief that the Secretary failed and refused to read said brief.

(j) Petitioner further alleges on information and belief that the Secretary did not read any fair or adequate abstract, analysis or synopsis of said brief.

(k) Petitioner alleges on information and belief that the Secretary did not examine or consider said brief.

(l) Petitioner alleges on information and belief that the Secretary did not judicially appraise the arguments contained in said brief.

(m) At the conclusion of the administrative hearings before said examiner, petitioner demanded that a tentative report upon the evidence be prepared to which it might make exceptions prior to oral argument before the Secretary thereon. Petitioner's demand was refused and no tentative report was ever prepared.

(n) On information and belief, instead of personally considering the evidence and argument presented by petitioners and judicially appraising the same, the said Secretary, without warrant or
222 authority of law, delegated to one Rexford G. Tugwell, who purported to act in the premises as and in the place and stead of the Secretary of Agriculture, the powers and authority vested by law solely in the said Secretary, which powers and authority involved the exercise of legislative and judicial discretion and the determination of the issues with respect to the justice, reasonableness and lawfulness of the rates and charges of this petitioner. Said purported appointment of said Tugwell as Acting Secretary of Agriculture to act in the place and stead of the said Secretary was unauthorized and illegal by reason of the fact that from the time he began to act until June 14, 1933, when the order herein was made, the said Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause in the performance of the official duties of Secretary of Agriculture."

Wherefore your petitioners severally pray the order of this Court.

JOHN B. GAGE,

FREDERICK H. WOOD,

Counsel for Petitioners.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order granting leave to amend petitions

Filed November 6, 1936

The amended applications of petitioners in equity cases Nos. 2328-2378 to amend by interlineation the petitions therein having been duly considered by the Court and the Court being fully advised in the premises, are by the Court sustained. It is so Ordered.

(Signed) Arba S. Van Valkenburgh, United States Circuit Judge; (Signed) Albert L. Reeves, United States District Judge; (Signed) Merrill E. Otis, United States District Judge.

[File endorsement omitted.]

223

In United States District Court

In Equity. Nos. 2328-2378

[Title omitted.]

Answer to petitions as amended

Filed December 4, 1936

Come now the defendants in each of the above cases and answer the amended petitions as follows:

1. Defendants reiterate and adopt all of the allegations contained in the answer originally filed herein.

2. Answering Section IV of the petitions as amended, defendants say that the matters set forth in the first paragraph of said Section as amended are conclusions of law which do not require an answer; nevertheless, defendants deny each and every allegation of said first paragraph.

Defendants answer the allegations of the separate lettered paragraphs of Section IV as follows:

(a) Answering paragraph (a), defendants admit that Henry A. Wallace, Secretary of Agriculture, who made and signed the order of June 14, 1933, herein, was not personally present when any of the testimony herein was taken and that he did not physically hear any of said testimony when it was given. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (a).

(b) Answering paragraph (b), defendants admit that all of the testimony taken in the administrative proceeding herein was taken at hearings before John C. Brooke, an examiner of the Department

of Agriculture. Defendants admit that the petitioners offered the testimony of sixty-six witnesses and that the respondents offered the testimony of forty-four witnesses. Defendants admit that the Secretary of Agriculture did not physically hear the testimony presented. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (b).

(c) Defendants deny each and every allegation of paragraph (c).

(d) Defendants say that the matter alleged in paragraph (d) is a legal conclusion which does not require an answer;

224 nevertheless, defendants deny each and every allegation of paragraph (d).

(e) Answering paragraph (e), defendants admit that in the course of the administrative hearings before Examiner Brooke, the petitioners introduced one hundred thirty exhibits and that the respondents introduced three hundred eighty-six exhibits. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (e).

(f) Defendants deny each and every allegation of paragraph (f).

(g) Defendants say that the matter alleged in paragraph (g) is a legal conclusion which does not require an answer; nevertheless defendants deny each and every allegation of paragraph (g).

(h) Answering paragraph (h), defendants admit that at the conclusion of the administrative hearing before the examiner, petitioners demanded that the Secretary personally hear oral argument on their behalf, and that the Secretary did not personally hear oral argument in the sense of being physically present when such argument was made. Defendants say that oral argument was made by counsel for petitioners on March 24, 1933, before Assistant Secretary of Agriculture Rexford G. Tugwell, and that the oral argument was stenographically reported and transmitted to the Secretary of Agriculture along with the record, briefs, and other pertinent matters in the case, and that the Secretary considered said report of the oral argument, along with the record and briefs and other pertinent matters, in arriving at the rates prescribed in the order of June 14, 1933. Defendants further say that at the hearing for oral argument before Assistant Secretary Tugwell on March 24, 1933, counsel for petitioners made no objection whatsoever on account of the absence of the Secretary from the hearing, and that counsel for petitioners fully argued his case before Assistant Secretary Tugwell without indicating any objection to having the argument before said Assistant Secretary Tugwell.

(i) Answering paragraph (i), defendants admit that on or
225 about the 25th day of May 1933 petitioners submitted a brief on the law and facts involved in the administrative proceeding. Except as above expressly admitted, defendants deny each and every allegation of said paragraph (i).

(j) Defendants deny each and every allegation of paragraph (j).

(k) Defendants deny each and every allegation of paragraph (k).

(l) Defendants say that the matter alleged in paragraph (l) is a legal conclusion which does not require an answer; nevertheless, defendants deny each and every allegation of paragraph (l).

(m) Defendants admit the allegations of paragraph (m), but say that the facts contained in such allegations are irrelevant and immaterial as a matter of law to any cause of action which petitioners may have.

(n) Defendants deny each and every allegation in paragraph (n) except that defendants admit that from March 24, 1933, the date upon which counsel for petitioners made oral argument before Assistant Secretary of Agriculture Rexford G. Tugwell, to June 14, 1933, the date upon which the order herein was signed by Secretary of Agriculture Henry A. Wallace, the Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at no time during said period was either sick, absent, or disabled from any other cause in the performance of the official duties of the Secretary of Agriculture. Defendants further say that the oral argument was stenographically reported and transmitted to the Secretary of Agriculture, along with the records, briefs, and other pertinent matters in the case. Defendants further say that at the hearing for oral argument before Assistant Secretary Tugwell counsel for petitioners made no objection whatsoever on account of the absence of the Secretary of Agriculture from the hearing and that counsel for petitioners fully argued the case before Assistant Secretary Tugwell without indicating any objection to having the argument before him.

Wherefore, having fully answered, defendants pray that the
226 petitions as amended be dismissed at the cost of the petitioners and for the benefit of such other order or orders as the Court may deem appropriate.

Maurice M. Milligan, United States Attorney, by Richard K. Phelps, Asst.; John Dickinson, Assistant Attorney General; Wendell Berge, Special Assistant to the Attorney General; James C. Wilson, Special Attorney; G. N. Dagger, Attorney, Department of Agriculture.

DECEMBER —, 1936.

Received service of copy hereof this 4th day of December 1936.

JOHN B. GAGE,
By C. E. COWHERD,
Attys. for Petitioners.

[File endorsement omitted.]

In United States District Court for the Western District of Missouri
Western Division

In Equity. No. 2328 and Related Cases Nos. 2329-78

FRED O. MORGAN, DOING BUSINESS AS FRED O. MORGAN SHEEP COM-
MISSION COMPANY ET AL., PETITIONERS

vs.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
DEFENDANTS

Decree

Filed July 9, 1937

The above entitled cause having come on regularly for trial on the 4th day of May 1937, before Judges Arba S. Van Valkenburgh, Albert L. Reeves, and Merrill E. Otis, and testimony having been offered on behalf of the parties herein and affidavits and depositions having been duly filed and proof and testimony on behalf of the petitioners and the defendants having been duly submitted and heard and oral arguments having been made to the Court and Briefs filed by counsel for both sides and the cause having been fully submitted to this Court and the Court upon consideration of the above

mentioned testimony and depositions and affidavits, arguments
227 and briefs on the 2nd day of July 1937, having by the Honorable Merrill E. Otis, District Judge, duly made and filed herein a memorandum opinion, Special Findings of Facts and Conclusions of Law and having indicated judgment for the defendants.

It is on motion of counsel for the defendants.

Ordered, Adjudged, and Decreed that the petitions, as amended, herein filed by the petitioners shall be and the same are hereby dismissed at the petitioners cost.

Circuit Judge.

ALBERT L. REEVES,

District Judge.

MERRILL E. OTIS,

District Judge.

[File endorsement omitted.]

In United States District Court.

In Equity. Nos. 2328-2378.

[Title omitted.]

Order continuing temporary restraining order and staying operation of order of Secretary of Agriculture, dated June 14, 1933, pending appeal to Supreme Court of United States from decree of July 9, 1937, dismissing petitions herein

Filed August 16, 1937

Upon all the proceedings heretofore had herein, it is hereby found that the above-named consolidated causes came on to be heard before the undersigned, Merrill E. Otis, Judge of the District Court of the United States for the Western District of Missouri, Western Division; Arba S. Van Valkenburgh, Judge of the Circuit Court of the United States for the Eighth Circuit; and Albert L. Reeves, Judge of the District Court of the United States for the Western District of Missouri, Western Division, sitting as a District Court for said Division of said District, pursuant to the Packers and Stockyards Act of 1921 (42 Stat. 159) and the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 319); and that said Court on July 9, 1937, made and entered its joint and final decree therein dismissing the petitions filed by the petitioners herein; and that petitioners have duly filed with said Court their petition for appeal, assignments of error, prayer for reversal, and jurisdictional statement as required by the Rules of the Supreme Court of the United States; and that said appeal
230 prayed for has been duly allowed by this Court, and security for costs of said appeal has been duly filed as provided by said order of said Court, and citation to the respondents has duly issued; and that this appeal involves difficult and novel questions of law of fundamental importance, among others, questions as to the nature and scope of the quasi-judicial duty of the Secretary of Agriculture in making orders of the character involved herein; the necessity of his personally weighing and appraising the evidence as a whole in the administrative proceedings; the nature and scope of the duties cast upon respondents in such proceedings with respect to the summarizing of evidence; and the weight to be accorded to the opinion evidence in this case with respect to the potential performance of livestock salesmen; and it further appearing that unless, pending said appeal, said order signed by said Secretary on June 14, 1933, shall be wholly suspended and stayed and the temporary restraining order heretofore granted herein be continued in full force and effect, irreparable damage will result to the petitioners, and each of them, pending such appeal, should said decree be reversed on appeal; and, therefore, this Court being fully advised in the premises,

It Is Now Hereby Ordered, upon the consent of the solicitors for the respondents, that pending such appeal and the further order of this Court to be made pursuant to the final decision of the Supreme Court of the United States, said order of said Secretary of Agriculture signed June 14, 1933, shall be, and the same hereby is, suspended and stayed, and said temporary restraining order shall be, and the same hereby is, continued in full force and effect; and as a further condition of the granting of this stay that during the pendency of said appeal the conditions of said temporary restraining order shall continue in full force and effect, requiring that the petitioners, and each of them, continue to deposit for impounding with the Clerk of the District Court for the Western District of Missouri, Western Division, monthly, on or before the 10th day of each calendar month, a sum equal to the difference between the amount that petitioners, and each of them, hereafter and up to and including the time of the final determination of said cases, receive from the rates and charges for stockyard services supplied at the Kansas City Stock Yards as
 231 market agencies, and the amount that such petitioners, and each of them, during said time would receive if they should render said services at the maximum rates and charges as provided in said order signed by the Secretary of Agriculture on June 14, 1933, said moneys, together with any and all other moneys heretofore deposited and impounded with said Clerk by each of said petitioners pursuant to provisions and conditions under which the temporary restraining order was issued by this Court, to be held by said Clerk pending the further order of this Court to be made pursuant to the final decision of the Supreme Court of the United States.

Entered this 16th day of August 1937.

ARBA S. VAN VALKENBURGH.

ALBERT L. REEVES.

MERRILL E. OTIS.

Consented to: Wendell Berge, Hugh B. Cox, Solicitors for Respondents.

JULY 21, 1937.

[File endorsement omitted.]

232

In United States District Court

Mandate of Supreme Court

Filed June 6, 1938

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
 [SEAL]

To the Honorable the Judges of the District Court of the United States for the Western District of Missouri, greeting:

Whereas, lately in the District Court of the United States for the Western District of Missouri, before you, or some of you, in a cause

between Fred O. Morgan, Doing Business as Fred O. Morgan Sheep Commission Company, et al., Petitioners, and The United States of America and the Secretary of Agriculture, Defendants, Equity No. 2328, and related cases Nos. 2329-78, wherein the decree of the said District Court, entered in said cause on the 9th day of July, A. D. 1937, is in the following words, viz:

"The above entitled cause having come on regularly for trial on the 4th day of May 1937 before Judges Arba S. Van Valkenburgh, Albert L. Reeves, and Merrill E. Otis, and testimony having been offered on behalf of the parties herein and affidavits and depositions having been duly filed and proof and testimony on behalf of the petitioners and the defendants having been duly submitted and heard and oral arguments having been made to the Court and Briefs filed by counsel for both sides and the cause having been fully submitted to this Court and the Court upon consideration of the above mentioned testimony and depositions and affidavits, arguments, and briefs on the 2nd day of July 1937 having by the Honorable Merrill E. Otis, District Judge, duly made and filed herein a memorandum opinion, Special Findings of Facts and Conclusions of Law and having indicated judgment for the defendants.

233 It is on motion of counsel for the defendants.

Ordered, Adjudged, and Decreed that the petitioners, as amended, herein filed by the petitioners shall be and the same are hereby dismissed at the petitioners' cost.

_____, *Circuit Judge.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large, appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the Decree of the said District Court, in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

April 25, 1938

234 You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the third day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

CHARLES ELMORE CROPLEY,

Clerk of the Supreme Court of the United States.

235

In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases Nos. 2329-78

Defendants' motion for order staying distribution of impounded moneys

Filed June 7, 1938

Now come the United States and the Secretary of Agriculture, respondents herein, by their attorney, Maurice M. Milligan, and respectfully show the Court:

1. These suits, consolidated for the purpose of trial, were brought by petitioners to restrain the enforcement of an order of the Secretary of Agriculture issued on June 14, 1933, fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. By an opinion dated April 25, 1938, and by a further opinion dated May 31, 1938, denying respondents' petition for rehearing; the Supreme Court of the United States held that the order of the Secretary had been issued without, according to petitioners, the hearing required by law; and the said Court reversed the decree of this Court dismissing the petitions, and remanded the case to this Court "for further proceedings in conformity with our opinion." The mandate of the Supreme Court of the

United States was received by this Court on June —, 1938.
236 2. Upon petitioners' applications, this Court, in the exercise of the discretion conferred upon it by Section 316 of the Packers and Stockyards Act (7 U. S. C. § 217) and by the Act of October 22, 1913 (28 U. S. C. § 46), granted on July 22, 1933, and from time to time continued an interlocutory stay of the order issued by the Secretary of Agriculture on June 14, 1933, conditioned, however, upon the payment into court by petitioners of the difference between the rates established by tariffs published prior to June 14, 1933, and the lower rates fixed by the said order of the Secretary. Between July 22, 1933, and November 1, 1937, when a new rate schedule became effective by consent, petitioners paid into court pursuant to the aforesaid condition sums aggregating more than \$700,000; and these moneys are now in the custody of the Clerk of this Court and subject to order of the Court made in accordance with law.

3. The said moneys were impounded by the Court in order to protect the substantial rights of all parties interested in or affected by

the order of the Secretary of June 14, 1933; and the principles of equity and the provisions of the Packers and Stockyards Act alike require that the moneys shall be disposed of only in accordance with the substantial rights of such parties as duly and finally determined. No court has yet held that the excess charges collected by petitioners under the interlocutory order of the Court were reasonable or lawful, nor has any court yet held that the rates fixed by the Secretary in his order of June 14, 1933, were unreasonable. The impounded moneys stand as security for the enforcement of the respective claims of the parties herein and of the shippers with respect to these questions. Until these questions have been duly and finally determined, no distribution of the moneys can be made which will not prejudice either the rights of petitioners to collect reasonable charges for their services or the right of the shippers not to be compelled to pay charges in excess of what is reasonable, and which will not prejudice the rights of all parties to secure an authoritative and enforceable determination as to what charges are reasonable.

237 4. On June 1, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the aforesaid order of June 14, 1933, was entered. In the said order of June 1, 1938, the Secretary of Agriculture directed that the "Proceedings, Findings of Fact, Conclusions, and Order" as issued by the Secretary of Agriculture on June 14, 1933, be served upon the market agencies operating on the Kansas City stockyards as the tentative findings of fact, conclusions, and order of the Secretary of Agriculture in the reopened proceeding, and that the said market agencies be given thirty days from the date of service of the said order of June 1, 1938, within which (1) to file exceptions to said tentative order, conclusions, and findings of fact, in accordance with the rules of practice adopted by the Secretary of Agriculture governing the procedure in such cases, and (2) to make any appropriate motions or objections with respect to further proceedings in the case. A copy of the said order of June 1, 1938, is attached hereto as an exhibit. In the proceeding reopened by the said order of June 1, 1938, the Secretary, as provided by the rules of procedure adopted for such cases on September 14, 1936, will accord to petitioners every right to which the Supreme Court of the United States has held that they are entitled. After full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them. That order will finally determine—or if the order be the subject of litigation, the final judgment of the court in that litigation will finally determine—all the questions decisive of the rights of the parties herein and of the shippers in the moneys impounded in this Court pursuant to the Court's interlocutory order of July 22, 1933. The withholding of the distribution of the said moneys pending the entry of this order by the Secretary will make it possible for the question of the ultimate ownership of these moneys to be determined in an orderly manner, will prevent a multiplicity

238 of suits, will assure that the moneys will be disposed of in accordance with equity and law, and will protect the substantial rights of all parties whose rights and interests are involved.

Wherefore, the United States and the Secretary of Agriculture, by their attorney, Maurice M. Milligan, respectfully move the Court to enter an order staying all further proceedings herein and directing the Clerk of this Court to retain in his custody the moneys impounded in this Court pursuant to the interlocutory order made by the Court on July 22, 1933, and continued in effect from time to time by further orders of this Court, until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction or until further order of this Court.

MAURICE M. MILLIGAN,
United States Attorney.
By THOMAS A. COSTLOW,
Assistant.

239 [Duly sworn to by Martin G. White; jurat omitted in
printing.]

240 Exhibit A to motion

No. —

United States of America
Department of Agriculture

June 6, 1938

Pursuant to Title 28, Section 661, U. S. Code (Section 882, Revised Statutes of the United States), I hereby certify:

1. That there are now on file in this Department the following-described original documents:

Order reopening proceeding—BAI Docket No. 311.

Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Livestock Commission Co., et al., Market Agencies, doing business at the Kansas City Stockyard, Kansas City, Mo.

2. That a true and correct copy of the original of each of said documents is attached hereto.

By direction of Henry A. Wallace, Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

[SEAL]

J. D. LA CROSS,
Assistant to the Secretary of Agriculture.

United States of America
Before the Secretary of Agriculture
Bureau of Animal Industry
Docket No. 311

SECRETARY OF AGRICULTURE

v.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVESTOCK COMMISSION COMPANY, ET AL., MARKET AGENCIES, DOING BUSINESS AT THE KANSAS CITY STOCKYARD, KANSAS CITY, MISSOURI, RESPONDENTS

Order reopening proceeding

Whereas the Secretary of Agriculture, on June 14, 1933, issued his findings of fact, conclusion, and order in the above entitled proceeding, declaring that the rates and charges which were then being demanded and collected by the market agencies operating on the Kansas City Stockyards were unreasonable, and further finding and prescribing just and reasonable rates and charges set forth in detail in said order; and

Whereas suits were filed in the United States District Court for the Western District of Missouri by various market agencies attacking the validity of said order, and seeking an injunction against its enforcement; and

Whereas the court granted a temporary restraining order in which it was provided that the market agencies should impound with the court the moneys collected in excess of the rates and charges prescribed by the Secretary of Agriculture in said order; and

Whereas on October 29, 1934, the District Court rendered an opinion and entered findings of fact and conclusions of law upholding the order of the Secretary of Agriculture, rejecting all the contentions of the market agencies, and adopting as its own the findings of fact made by the Secretary of Agriculture; and

242 Whereas, on the appeal of the market agencies, the Supreme Court held, on April 25, 1938, that the Secretary's order was invalid because the market agencies were not fairly advised of what the Government proposed to do, and were not given opportunity to be heard upon such proposals;

It is therefore ordered that said proceeding be, and the same is hereby, reopened; and

It is also ordered that the "Proceedings, Findings of Fact, Conclusion, and Order," as issued by the Secretary of Agriculture on June 14, 1933, be served upon said market agencies as the tentative findings of fact, conclusion, and order of the Secretary of Agriculture in this proceeding; and

It is further ordered that said market agencies be, and they are hereby, given thirty (30) days from the date of service hereof within

which to file exceptions to said tentative findings of fact, conclusion, and order, in accordance with the rules of practice adopted by the Secretary of Agriculture, governing the procedure in such cases, and within which to make any appropriate motions or objections with respect to further proceedings in this case; and

It is further ordered that said market agencies, if they file exceptions to said tentative findings of fact, conclusion, and order and desire to make an oral argument on the exceptions, may, if they wish to do so, request that such oral argument be held before the Under Secretary or Assistant Secretary of Agriculture;

It is further ordered that this order be served by mailing a true copy thereof, by registered mail, to the attorneys of record representing the market agencies who filed said suits.

In witness whereof the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, this the 2nd day of June 1938.

[SEAL]

(Signed) H. A. WALLACE,
Secretary of Agriculture.

[Title omitted.]

243

In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-78.

Reply of plaintiffs to defendants' motion for order staying distribution of impounded funds

Filed June 11, 1938

Come now the plaintiffs herein by their attorneys of record and respectfully move the court to deny and overrule defendants' motion for order staying distribution of impounded moneys held by the Clerk of this court in the Registry of the court for the following reasons:

1. Because said motion is impertinent and irrelevant to any issue presented to the court in the above entitled causes which issues have been fully and finally determined by final decree entered in accordance with a mandate of the Supreme Court.

2. Because the defendants and neither of them have any right, title, or interest in or to said funds so deposited in the Registry of this court with the Clerk of this court, but all of said funds, subject to the right of the Clerk to deduct the lawful charges for the custody thereof as provided by statute, are the sole property of these plaintiffs.

3. Because the allegations of said motion contained in paragraph 3 thereof are predicated upon the alleged right of this court to act legislatively and to determine retroactively what rates and charges collected by petitioners are reasonable or

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lawful, whereas this said court is wholly without such power in fact or in law.

Plaintiffs state that as shown by the evidence at the trial of this cause the Secretary of Agriculture by a valid order effective January 1, 1926, in a proceeding under said Act known as Docket No. 11 of the Department of Agriculture, Bureau of Animal Industry, upon complaint and after full hearing, prescribed as just and reasonable, certain maximum rates and charges for these plaintiffs, a copy of said order as approved by said Secretary being in evidence in this case as plaintiffs' Exhibit "24"; that the rates and charges actually collected during the period of said impounding were lower than the maximum rates so fixed by such order of January 1, 1926, and were those set forth in Tariffs duly filed by plaintiffs with the Secretary of Agriculture under said Act on the 11th day of May 1932, in further compliance with said prior order. The copy of said order, Exhibit "24," and the admission of the defendants in their answer filed in this case that the rates set forth in the said Tariffs filed by plaintiffs on the 11th day of May 1932, were lower by more than ten percent than the maximum rates prescribed by said prior order effective January 1, 1926, are by reference made a part of this motion.

Plaintiffs state that the Secretary of Agriculture has not in any proceeding after full hearing by valid order determined such rates and charges to be unjust, unreasonable, discriminatory, or unlawful, and that as actually collected by plaintiffs at all of the said times in defendants' motion mentioned the said rates were the legal rates which plaintiffs under said Act were required to and did collect.

245 4. Because the alleged determination of the Secretary to enter a new order retroactively effective "as of June 14, 1933" in respect of which "the rules of procedure adopted for such cases on September 14, 1936" will be followed, cannot under the said Packers and Stockyards Act, 1921, determine what shall be the just and reasonable rates and charges to be charged by petitioners at or upon any date prior to five days after the actual entry and issuance thereof by the Secretary under the provisions of the said Packers and Stockyards Act, 1921, particularly Section 310 thereof, and, therefore, cannot in any manner affect or impair the right, title, and interest of the plaintiffs in and to the moneys deposited by plaintiffs with the Clerk of this court and referred to in said motion, or constitute any reason for staying or delaying the restitution thereof to the plaintiffs herein, and that any attempt by the Secretary to give a retroactive or ex post facto effect to the said proposed order in respect of said moneys so impounded, or the right, title, and interest of plaintiffs therein would be in violation of the Constitution of the United States.

5. Because the alleged reopening of the proceedings out of which the purported order of June 14, 1933, held invalid by the court arose in so-called Docket No. 311, cannot involve a lawful and legislative

determination of rates by reason of the stipulation and order of modification entered by the Secretary on the 14th day of October, 1937, effective as of the first day of November 1937, establishing rates thereafter to be effective and recognizing substantial changes in conditions affecting the operations of petitioners since the year 1931, the year to which the latest evidence taken related. A copy of said stipulation and order of modification is hereto attached and made a part hereof.

6. Because under the provisions of the Packers and Stock-
246 yards Act, 1921, and upon the evidence taken in connection with the proceeding referred to in defendants' motion, the Secretary proposes, without authority of law under the guise of exercising his legislative power *nunc pro tunc* as of June 14, 1933, to attempt to act judicially and to award reparations and because such action would involve the recognition in the Secretary of authority to suspend by untimely proceedings schedules and tariffs lawfully filed by petitioners for a period of more than five years although said Act authorized only timely suspension for stated reasons for a period of sixty days after such schedules were filed.

7. Because this court cannot properly indulge the presumption that the Secretary will at some future date render after full hearing an *ex post facto* order holding the rates and charges collected by plaintiffs to be unlawful, and that such order would be sustained if subjected to proper court review.

8. Because withholding from petitioners of said impounded funds pursuant to said motion would improperly, unjustly, and without authority of law deny to petitioners their equitable as well as legal right to the immediate possession of such funds in that it appears from the record of this proceeding that a majority of this court considering such record in an opinion rendered on the 20th day of June 1935 stated that the Secretary had departed from the methods employed in previous like cases in connection with the making of the purported order; that the drastic reduction in advertising and other costs made by the purported order gave "scant consideration to the reasonable necessities of the situation," and that the effect of the methods employed might "as suggested by the petitioners tend to weaken and to ultimately destroy the market by diverting business to more favored markets and agencies," and might tend "further to the undue restriction of agencies enabled to operate profitably with a result injurious not only to the Kansas City Live Stock

Market "but equally to the shippers of stock conveniently
247 patronizing it," and because it further appears that from the record in this case that a large number of petitioners have already been compelled to discontinue business by reason of impoundings required during the period of the pendency of this case and prior to the adjudication of said order as invalid, and because others of petitioners continuing in business have suffered financially by reason of such situation to an extent which may, unless said funds

are immediately restored to them, impair their ability to render in the future efficient service to those who may be called upon to use their necessary services in connection with the sale and purchase of live stock as required by said Packers and Stockyards Act.

Wherefore, these plaintiffs respectfully move the court to deny and overrule the motion of the defendants for an order staying distribution of said funds.

FREDERICK H. WOOD,
JOHN B. GAGE,
Attorneys for Plaintiffs.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

248 [Duly sworn to by Frederick H. Olander; jurat omitted in
printing.]

249 United States of America

Before the Secretary of Agriculture

Bureau of Animal Industry

Docket No. 311

SECRETARY OF AGRICULTURE

v.

L. B. ANDREWS, DOING BUSINESS AS L. B. ANDREWS LIVESTOCK COM-
MISSION COMPANY, ET AL., PETITIONERS

STIPULATION AND ORDER OF MODIFICATION OF ORDER

STIPULATION

Whereas, pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended, the Secretary of Agriculture issued an order in the above-entitled case on the 14th day of June 1933, prescribing reasonable rates and charges to be observed by respondents for their services as market agencies; and,

Whereas, the validity of said order is in question in certain actions brought by petitioners in the District Court of the United States for the Western Division of the Western District of Missouri, said actions being now pending upon appeal from the decree of said court in the Supreme Court of the United States; and,

Whereas, petitioners, members of the Kansas City Livestock Exchange through their duly authorized agents have filed a petition with the Secretary of Agriculture alleging that substantial changes have occurred since 1931, the year on which the order was based, in

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practically all of the costs affecting the business of petitioners more particularly as follows:

- (a) Increased and increasing costs of living.
- (b) Increased cost of stationery, printing, taxes and postage.
- (c) New expenses and taxes brought about by the Social Security Act.
- (d) Decline in receipts of certain species of livestock.
- (e) Increased volume of small lots of livestock caused by increased truck receipts, and in many other ways. Petitioners further allege the value of the services rendered by them to the rate-payer has increased since 1931 because of the substantial increases in the values of livestock. In support of these allegations petitioners submit exhibits setting out statistical information relating to costs and expenses; and,

250 Whereas representatives of the Department have made detailed analyses of the data submitted by petitioners herein showing the results of the operations of a number of representative market agencies for the year ended June 30, 1937, and comparisons thereof with the operations for the year 1931, the year on which the order was based, and have submitted detailed reports of their findings; and

Whereas the facts set forth in the petition which were examined show that changes in conditions affecting the costs of expenses of operations of petitioners do not warrant a modification of the order to the extent requested, but do warrant some modification of the rates prescribed in said order, due chiefly to (a) a substantial decrease in the gross income of the petitioner agencies which has necessitated a substantial reduction in the salaries paid to their employees and a reduction in the number of employees; (b) increasing cost of living and a trend toward increased wages for labor of a class which is to some extent employed by petitioners in the conduct of their business; (c) a marked increase in the arrival of livestock by truck which necessarily increased the handling of small consignments, occasioning more work and greater expense; (d) increased expenses due to taxes as the result of Federal and State legislation since 1931; and (e) decreased in receipts of livestock.

Now, therefore, the petitioners agree that if the modification of the order hereinbefore stated is granted it will be for the period from November 1, 1937, to and including April 30, 1938, and for such time thereafter as the Secretary may need for the consideration of the reports herein required, and that pending the final determination of the actions hereinbefore referred to in which the validity of said order of June 14, 1933, is in question and thereafter in the event the validity of such order be sustained in said actions, the Secretary may, without further hearing, make such further modifications of the order as he deems proper in the circumstances with the understanding, however, that no reduction will be made below the rates and charges fixed by said order of June 14, 1933, without

petitioners' consent, except after a hearing pursuant to the Packers and Stockyards Act, 1921; and,

Petitioners further agree to submit to the Secretary at the close of 1937 and quarterly thereafter an itemized statement of the number of head of cattle and calves sold in each class and group and the charges collected thereon according to the provisions of the tariff as herein modified, and that the Secretary may use the information contained in such reports as a basis for considering further modification without a hearing; and,

Petitioners and the Secretary of Agriculture further agree that if a modification of the order as hereinbefore stated be granted by the Secretary, it shall be without prejudice to either petitioners or the defendants in said actions; that a suitable motion or stipulation agreeable in form and content to the Secretary and his attorneys shall be presented to the court in connection with the further impounding of funds by petitioners under orders entered in said
251 actions; and that this stipulation shall not be considered in evidence or a part of the record, or be used by any of the parties to such actions for the purpose of affecting in any way the final determination of the issues presented by such litigation.

Respectfully submitted this eleventh day of October, 1937.

(Signed). By JOHN B. GAGE,

*For and on behalf of petitioners, members
of the Kansas City Livestock Exchange.*

ORDER OF MODIFICATION

The petition, information and the foregoing stipulation have been considered. Subject to the conditions set forth in the foregoing stipulation the order of June 14, 1933, is hereby modified effective on the first day of November, 1937, providing for rates and charges for the selling and buying of cattle and calves as follows, to continue in effect until further order of the Secretary:

Definitions

A consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day.

A consignment, for the purpose of assessing buying charges, is all the livestock of one species bought at any time to ship or deliver to one person on one market day.

A draft, is all those animals in one consignment weighed as a single sales or purchase classification.

A person, is an individual, a partnership, a corporation, and/or an association of any such acting as a unit.

Calves, are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 70 pounds and under 700 pounds.

Medium weight cattle, are animals of the bovine species, weighed in drafts, the average weight of animals in which is 700 pounds and under 1,000 pounds.

Heavy weight cattle, are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 1,000 pounds and over.

252 Section A—Cattle and Calves—Selling Charges

Calves:

Consignments of a single head.....	\$.40 per head
Consignments of more than one head:	
First 1 to 15 head.....	.30 per head
Next 16 to 30 head.....	.20 " "
Next 31 to 60 head.....	.15 " "
61 head and over.....	.10 " "

Light weight cattle:

Consignments of a single head.....	\$.70 per head
Consignments of more than one head:	
First 1 to 15 head.....	.60 " "
Next 16 to 30 head.....	.45 " "
Next 31 to 60 head.....	.35 " "
61 head and over.....	.25 " "

Medium weight cattle:

Consignments of a single head.....	\$.80 per head
Consignments of more than one head:	
First 1 to 15 head.....	.70 " "
Next 16 to 30 head.....	.55 " "
Next 31 to 60 head.....	.45 " "
61 head and over.....	.35 " "

Heavy weight cattle:

Consignments of a single head.....	\$.85 per head
Consignments of more than one head:	
First 1 to 15 head.....	.75 " "
Next 16 to 30 head.....	.65 " "
Next 31 to 60 head.....	.55 " "
61 head and over.....	.45 " "

Buying Charges

The rates for buying cattle and calves shall not be in excess of the rates prescribed herein.

In witness whereof the Secretary of Agriculture has hereunto set his hand and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 14th day of October, 1937.

(signed) H. A. WALLACE,
Secretary of Agriculture.

[Title omitted.]

In Equity. No. 2356

Answer to defendants' motion for order staying distribution of impounded funds

Filed June 11, 1938

Comes now New Amsterdam Casualty Company and does state to the court that on motion made in the Supreme Court of the United

States the New Amsterdam Casualty Company was substituted for and in the place and stead of Harry J. Kennaley in the above entitled cause, and does further state that on the 2nd day of January, 1936, the said Harry J. Kennaley was expelled from the Kansas City Live Stock Exchange and from and after said date ceased to be and was not any further engaged in the business of buying and selling live stock, or being a marketing agency under the Packers & Stockyards Act; and that by assignment duly made, the said Harry J. Kennaley did assign and transfer unto the New Amsterdam Casualty Company, of Baltimore, Maryland, all of his right, title, and interest in and to all sums of money deposited and impounded with the Clerk of this court, in accordance with orders made in this cause.

254 It does further state that the said Harry J. Kennaley died on the 9th day of January 1938.

It does further state that by virtue of the facts above, the said order of the Secretary of Agriculture dated the first day of June 1938, could not in anywise be operative or effective as far as this cause is concerned, and that said order has not and could not be served upon the said Harry J. Kennaley, nor was it served upon the New Amsterdam Casualty Company, nor would it be of any force or effect to serve the same upon the New Amsterdam Casualty Company as it is not conducting the business formerly conducted by Harry J. Kennaley, nor is it now or ever has been a marketing agency as defined in the Packers & Stockyards Act.

It does further state that the Secretary of Agriculture by his pretended action cannot now cure the failure to give the said Harry J. Kennaley during his lifetime a full hearing, and that that failure to do so when proper to be done cannot be cured by the present attempted action on the part of the Secretary of Agriculture.

It does further state that the attempted action of the Secretary of Agriculture is not in accordance with the provisions of the Packers & Stockyards Act, and that said New Amsterdam Casualty Company, the now owner of the impounded funds, is not and cannot be made a party to any hearing or proceeding under said Packers & Stockyards Act as it is not and has not been a marketing agency.

255 It does further state that for the reasons above given the action of the Secretary of Agriculture in purporting to promulgate order referred to in said motion and by so doing to take away from the New Amsterdam Casualty Company its right, title, and interest in and to said impounded funds is taking the property of the New Amsterdam Casualty Company without due process of law contrary to the provisions of the 5th Amendment to the Constitution of the United States.

It does further state that the amount so impounded was collected by the said Harry J. Kennaley, and that he had title to said sums and the title to said sums remained in him though the possession and custody thereof was given to the Registry of the Court under the Court's orders, and that since the mandate of the Supreme Court that any and all assertions of other parties interested or entitled to

said funds have been wiped out so that at the time of the collection, deposit, and impounding of said funds there was and cannot be any adverse claim of interest and title to said funds as the New Amsterdam Casualty Company is the assignee of Harry J. Kennaley the right, title, and interest in and to said fund is wholly and completely vested in the New Amsterdam Casualty Company and the purported action on the part of the Secretary of Agriculture to deprive the New Amsterdam Casualty Company of the immediate possession of said funds and the purported action to undertake to deprive it of the title thereof in the future and in the manner so undertaken is depriving the New Amsterdam Casualty Company of its possession without due process of law, contrary to the 5th Amendment to the Constitution of the United States.

256 Wherefore, the New Amsterdam Casualty Company does pray that the court deny the motion of the Secretary of Agriculture filed in this cause, and that the court make an order directing the Clerk of this court to immediately pay over to the New Amsterdam Casualty Company the sums impounded in this cause by Harry J. Kennaley, d/b/a Harry Kennaley Commission Company, less whatever proper charges the said Clerk of the Court shall have against said impounded funds.

E. R. MORRISON,
HOMER H. BERGER.

Solicitors for New Amsterdam Casualty Company.

[Duly sworn to by Homer H. Berger jurat omitted in printing.]

257

In United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases. Nos. 2329-78

Petition for restitution of impounded funds

Filed June 11, 1938

Come now the petitioners by their attorneys, Frederick H. Wood, Thomas T. Cooke, and John B. Gage, and respectfully state:

1. That pursuant to the provisions of the certain temporary restraining or stay order entered on the 22nd day of July 1933 by this Court, and the various extensions thereof, and between the date of said order and the first day of November 1937, these petitioners deposited with the Clerk of this Court the respective amounts set forth in the schedule hereto attached, prepared by the Clerk of this Court, marked Exhibit "A" and made a part hereof, the total amount of such deposits being the sum of Five Hundred Eighty Six Thousand Ninety-three and 32/100 Dollars (\$586,093.32), in respect of which, as set out in said Exhibit "A," a lawful deduction for fees of the

Clerk, according to the statute in such cases made and provided, amounts to the sum of Five Thousand Eight Hundred Sixty and 95/100 Dollars (\$5,860.95), leaving in the Registry of this Court and in the possession and custody of the Clerk of this Court for such distribution as the Court may order, the net amount of Five Hundred Eighty Thousand Two Hundred Thirty-two and 37/100 Dollars (\$580,232.37).

258 2. This Court, pursuant to the mandate of the Supreme Court of the United States has entered herein its decree suspending, setting aside, and annulling the order of the Secretary of Agriculture dated June 14, 1933, referred to in the petition of the respective petitioners herein, and has issued its injunction granting, and under the terms of said decree, a permanent injunction restraining the defendants in respect of the enforcement of said order.

3. Each of the respective petitioners herein, plaintiffs in said action, are, respectively, entitled to prompt restitution of the net amount set out opposite their respective names in each of the respective numbered cases shown in said Exhibit "A" as the sole and exclusive property of plaintiffs, the same constituting funds of plaintiffs deposited with the Clerk of this Court pursuant to the aforesaid order of this court, equal in amount to the sum by which the rates and charges unlawfully ordered into effect by the Secretary of Agriculture under said order of June 14, 1933, exceeded the lawful Rates and Charges prescribed in Schedules and Tariffs of Rates and Charges for stockyards services properly and duly filed with the said Secretary of Agriculture at the time hereinbefore set forth.

4. The following petitioners, plaintiffs in the respectively numbered cases hereinafter set out opposite the names of such petitioners, as disclosed by affidavits filed with the Clerk of the Supreme Court on the former appeals of this case, which are made a part hereof as if set out herein, together with the affidavit of A. L. Arnold, Clerk of this Court, in respect thereto, were compelled by reason of the impoundings of funds required by said order of this Court to discontinue and are no longer engaged in business as market agencies at the Kansas City Stock Yards, as in said petitions alleged, to-wit:

259

No. of case	Name of Petitioner	Net amount impounded
2328	Fred O. Morgan, doing business as Fred O. Morgan Sheep Commission Company	\$116.38
2330	H. H. Klecker, doing business as H. H. Klecker Sheep Commission Company	916.94
2347	Henry F. Carnes, doing business as Henry F. Carnes Livestock Commission Company	472.23
2349	Drummond Standish Commission Company, a corporation	2,814.87
2356	Harry J. Kennaley, doing business as the Kennaley Commission Co.	3,031.05
2366	J. D. McCormick, doing business as D. J. McCormick Live Stock Commission Company	880.94
2369	Ben L. Welch, doing business as Welch Live Stock Commission Company	511.48
2371	W. E. Curtis, doing business as W. E. Curtis & Company	820.51
2374	Walter G. Land & John E. Maze, partners, doing business as Walter G. Land Live Stock Commission Co.	749.21
2375	Less White, doing business as Less White Live Stock Commission Co.	1,398.53
2382	Ham-Knighton, doing business as Ham-Knighton Live Stock Commission Co.	3,921.60
2372	Norman B. Greer, doing business as Greer & Company	2,136.79

5. The petitioners state that those petitioners mentioned in paragraph 4 hereof, which have discontinued business, as well as others of your petitioners have in many instances been unable to secure the funds with which to pay their proportionate share of the expenses of the prosecution of these cases, including the cost of the respective appeals had therein, that others of said petitioners have been compelled by financial stress to assign to creditors, employees and other persons part or all of such contingent right of restitution as they may have possessed with respect to their interest in said funds other than those mentioned in paragraph 4 hereof, in order to enable themselves to continue to efficiently transact their respective businesses as market agencies and to continue during said period to make the deposits aforesaid with the Clerk of this Court; that certain of petitioners have been compelled to reduce the wages of necessary employees to amounts below the compensation for which said employees were willing to continue their employment unless additional compensation was allowed to such employees for the period
260 of their continued employment, the payment of which should be contingent upon the recovery of said deposits by such petitioners. In certain instances the partnerships formerly existing and which made such deposits as plaintiffs and petitioners herein, have been dissolved. All of which, petitioners allege may in many instances make it necessary that rights of third parties originating in petitioners arising by operation of law or contract created subsequent to the actual making of said deposits must be determined or resolved in connection with the restitution and disbursement of said funds, which in equity and at law should be immediately restored and paid over to such petitioners and their respective assignees, if any, as their interests may appear.

6. Petitioners state that matters in connection with the management of the prosecution of these cases have in the past been largely handled and managed on behalf of petitioners by a committee consisting of the following named persons, all residents of Kansas City, Missouri: Bryant Poole, A. Chester Bates, Charles H. Haren, Robert A. Willis, Frank Witherspoon, E. W. Elliott, Fred H. Olander and C. A. Stuart; that each and all of said petitioners are as has been shown by the record in these cases, members of the voluntary organization known as the Kansas City Live Stock Exchange; that under the existing and valid rules of said Exchange the arbitration committees and the Board of Directors thereof are authorized and empowered to determine, after hearing and upon evidence, any controversies which may arise of a mercantile or commercial character between the members thereof; that in the event the Court should order restitution to petitioners of said amount as hereinafter prayed, petitioners believe it would be in the best interests of the parties and promote the proper distribution of said fund and restitution

261 thereof to the respective petitioners and their assignees, and the proper prompt and expeditious determination of any controversies arising with respect to interests therein, if this Court would appoint the members of said committee hereinbefore named as assistant custodians of said funds or representatives of the Court to serve as such without compensation other than the payment of their expenses as may be allowed by Court and to supervise, under the direction and control of the Court and in pursuance of such orders as it may from time to time make, the distribution and restitution of said funds and the discharge thereof from and in respect of any liens arising out of unpaid expenses, court costs, or otherwise, in connection with the prosecution of these cases, such funds to be disbursed by checks duly issued on the proper depositories by the Clerk of this Court, countersigned by such representatives of the Court, or a majority thereof, as the Court may from time to time determine.

Wherefore, your petitioners pray that this Court order and direct the Clerk of this Court, after the deduction of his lawful fees and expenses as hereinabove indicated, to make restitution as soon as may be to the respective petitioners, and each of them, in the above entitled cases of the funds so deposited by such petitioners as shown on Exhibit A hereto attached; that all claims or assignments arising under the rights herein arising on behalf of petitioners be filed with said Clerk on or before a date to be fixed by the Court, or be forever barred; that the persons hereinbefore named be appointed as representatives or assistant custodians of said funds to supervise such distribution and restitution, endeavoring, if possible, to settle and determine any controversies arising with respect to liens asserted by persons claiming under said petitioners through assignment or otherwise, to make recommendations to this Court for action
262 in respect to such distribution in order that it may be assured that it be accomplished and carried out expeditiously, fairly, and economically, and for such other and further orders as to the Court may seem meet and proper in the premises.

Dated this 11th day of June, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
THOMAS T. COOKE.
Attorneys for Petitioners.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

263 [Duly sworn to by Frederick H. Olander; jurat omitted in printing.]

Case No.	Firm name	Collections	Earnings	Net amounts
2328	Fred O. Morgan Sheep Comm. Co.	\$117.56	\$1.18	\$116.
2329	Ragland, Storts & Burris	11,083.27	110.83	10,972.
2330	Hinie Klecker Sheep Com. Co.	926.20	9.26	916.
2331	Lewis-Flournoy L. S. Comm. Co.	2,386.40	23.87	2,362.
2332	Maxwell-Furnish L. S. Com. Co.	10,817.13	108.17	10,708.
2333	John M. Nichols L. S. Com. Co.	2,368.26	23.68	2,344.
2334	Bowles, L. S. Com. Co.	12,745.12	127.45	12,617.
2335	Crider Brothers Com. Co.	13,588.62	135.89	13,452.
2336	Charles Dixon Com. Co.	14,299.42	142.99	14,156.
2337	Elliott, Swain & Co.	3,727.71	37.28	3,690.
2338	Farrar, Davis & Campbell L. S. Com. Co.	6,609.42	66.09	6,543.
2339	Gladish L. S. Com. Co.	3,162.05	31.62	3,130.
2340	Haggart-Wilson L. S. Com. Co.	15,074.75	150.75	14,924.
2341	Kansas City L. S. Com. Co.	8,292.30	82.92	8,209.
2342	Fern O. Sanders L. S. Com. Co.	5,537.17	55.37	5,481.
2343	Stuart-Robinson-Hoover Co.	9,868.64	98.69	9,769.
2344	Wester Brothers & Smith Com. Co.	13,815.19	138.15	13,677.
2345	The Stagner, Pieronnet & Wilson L. S. Com. Co.	10,562.18	105.62	10,456.
2346	Tamblyh Com. Co.	5,159.92	51.60	5,108.
2347	H. F. Carnes L. S. Com. Co.	477.00	4.77	472.
2348	Warren Cummings L. S. Com. Co.	12,283.65	122.83	12,160.
2349	Drumm-Standish Com. Co.	2,843.30	28.43	2,814.
2350	Link-Faskin			
2351	Long-Perry L. S. Com. Co.	21,639.54	216.40	21,423.
2352	Knight & Tice Sheep Com. Co.	2,860.60	28.61	2,831.
2353	W. M. Leitch Sheep Com. Co.	7,851.68	78.52	7,773.
2354	National L. S. Com. Co.	34,131.03	341.31	33,789.
2355	Poole-Dempsey-Rutherford L. S. Com. Co.	15,282.90	152.83	15,130.
2356	Harry Kenalley Com. Co.	3,064.70	30.65	3,034.
2357	Brake-Martin L. S. Com. Co.	9,357.90	93.58	9,264.
2358	John Clay & Co.	64,234.32	642.34	63,591.
2359	Wright & Bacus L. S. Com. Co.	10,659.17	106.59	10,552.
2360	Swift & Henry L. S. Com. Co.	52,980.50	529.81	52,450.
2361	H. Theis & Sons	5,485.65	54.86	5,430.
2362	Ham Knighton L. S. Com. Co.	3,961.21	39.61	3,921.
2363	Laird Brothers L. S. Com. Co.	12,445.90	124.46	12,321.
2364	Martin, Bloomquist & Lee Com. Co.	33,020.80	330.21	32,690.
2365	Moffett L. S. Com. Co.	13,209.38	132.09	13,136.
2366	Jay D. McCormick L. S. Com. Co.	889.84	8.90	880.
2367	Kile Com. Co.	13,472.65	134.73	13,337.
2368	Ryan-Robinson Com. Co.	15,756.85	157.57	15,599.
2369	Welch Livestock Com. Co.	511.39	5.11	506.
2370	Witherspoon Livestock Com. Co.	20,128.27	201.28	19,926.
2371	W. E. Curtis & Co.	828.80	8.29	820.
2372	Greer & Company	2,158.37	21.58	2,136.
2373	Inman-Hutton L. S. Com. Co.	4,436.10	44.36	4,391.
2374	Walter G. Land L. S. Com. Co.	756.78	7.57	749.
2375	Less White L. S. Com. Co.	1,917.71	19.18	1,898.
2376	Wilson, Egan & Co.	32,295.92	322.96	31,972.
2378	Cassity S. W. Com. Co.	16,540.16	165.40	16,374.
2377	Burlington L. S. Com. Co.	20,410.53	204.11	20,206.
	Funds Deposited with Court	\$586,098.32		
	Earnings of 1%		\$5,860.45	
	Net Amounts			\$580,237.

[Title omitted.]

In Equity. No. 2328 and Related Cases. No. 2329-78

Order on motion, restitution

Filed June 18, 1938

This cause coming on to be heard upon the petition of plaintiff for an order of this court for the restitution to the respective plaintiffs of impounded funds heretofore respectively deposited by the

with the clerk of this court herein and in the possession and custody of said clerk, between July 22, 1933, and November 1, 1937, under a temporary restraining order of this court issued hereon on July 22, 1933, and various extensions thereof, and the court having considered said petition and having heard the evidence with respect thereto and the arguments of counsel for plaintiffs and defendants for and against said petition and the order prayed for thereunder, and being fully advised concerning the matter, finds that this court in accordance with the mandate of the Supreme Court of the United States has entered herein its final decree suspending, setting aside, and annulling the order of the Secretary of Agriculture of the United States dated June 14, 1933, sought to be enjoined by plaintiffs in this action and permanently enjoining the defendants from enforcing said order of said Secretary, and that said respective plaintiffs are, therefore, entitled to the restitution of said impounded funds in the respective amounts as hereinafter set out and in accordance with the prayer of said plaintiffs herein for restitution.

It is, therefore, ordered, adjudged, and decreed that:

1. The aggregate amount of funds impounded with the clerk of this court in this case is Five Hundred Eighty Six Thousand Ninety Three and 32/100 (\$586,093.32) Dollars; and that the amount paid into said fund by each plaintiff, the amount to be deducted therefrom as to each plaintiff for the payment of fees the clerk is entitled to in respect thereof, and the net amount to be restored and refunded on account of each such plaintiff is fully set out in "Exhibit A," hereto attached and made a part thereof.

2. The court appoints the following persons, to-wit: Bryant Poole, A. Chester Bates, Charles H. Harem, Robert A. Willis, Frank Witherspoon, E. W. Elliott, Fred H. Olander, and C. A. Stuart, all residents of Kansas City, Missouri, and all members of the voluntary organization known as the Kansas City Live Stock Exchange, Kansas City, Missouri, as assistant custodians of said impounded funds to assist the clerk of this court, heretofore appointed and acting as custodian of said funds, in the payment, distribution, and restitution thereof; and to this end said assistant custodians shall supervise, under the direction and control of this court and in pursuance of such orders as it may from time to time make, the payment, distribution, and restitution thereof, and the settling and determination of any and all questions and controversies arising with respect to any and all claims and liens on said impounded funds or any part thereof asserted within the time hereinafter specified by any person or persons under said respective plaintiffs through assignment or otherwise, and arising also in respect of any liens for unpaid expenses, court costs, or otherwise, in connection with the prosecution of this suit: said assistant custodians shall serve as such without compensation, but they shall be entitled to reimbursement for such expenses as they may incur in connection therewith as may be determined and allowed by this court; and that such impounded

funds shall be paid and distributed only by check or checks drawn on the depository or depositories thereof, signed by the clerk of this court and countersigned by such assistant custodians or by a majority of such assistant custodians.

3. The court directs that said custodian and assistant custodian shall pay and distribute said impounded funds as follows:

(a) They shall first pay to the clerk of said court the sum of Five Thousand Eight Hundred Sixty and 95/100 (\$5,860.95) Dollars in payment of fees that he is entitled to by law and as such custodian.

(b) They shall then pay, distribute, and restore to each plaintiff his part of the remainder of said impounded funds as shown by "Exhibit A" referred to Paragraph 1 hereof, after deducting from the amount deposited into said fund by each plaintiff the amount to be paid to said clerk as fees as hereinbefore provided; provided, however, that if any claims or liens are asserted by assignment or otherwise or on account of unpaid expenses, court costs, or otherwise, in connection with the prosecution of these cases, to the refund or refunds or any part thereof that any plaintiff or plaintiffs would otherwise be entitled to hereunder, said assistant custodians, under the supervision and control of this court and subject to court order or orders in respect thereof, shall settle and determine such claims and liens

and the rights of the parties with respect thereto, the court
268 retaining full jurisdiction to make any and all further orders in regard to the payment and distribution thereof and the determination of the rights of particular parties to receive the funds and any and all other matters in connection therewith, except any such claims or liens must be filed with said custodian on or before July 11, 1938, or be forever barred from distribution under this order.

4. The court expressly reserves power and authority and retains jurisdiction as respects taxation and assessment of costs and allowance for fees to its officers and appointees for services already rendered or hereafter rendered, including expenses incurred by them with respect thereto, and to make further orders with respect of distribution of said impounded funds, and to take any action deemed necessary to effectuate the purposes of this order; jurisdiction over all persons or parties affected by this order is reserved for the purpose of effectuating this order.

Entered this 18 day of June, 1938.

ARBA S. VAN VALKENBURGH,
Judge of the Circuit Court.

ALBERT L. REEVES,
Judge of the District Court.

MERRILL E. OTIS,
Judge of the District Court.

200 Stockyards Cases—Equity 2328 to 2378, inclusive—Page 171

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2334	Bowles L. S. Com. Co.	12,745.12	127.45	12,617.67
2335	Orider Brothers Com. Co.	13,588.62	135.89	13,452.73
2336	Charles Dixon Com. Co.	14,299.42	142.99	14,156.43
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2339	Gladish L. S. Com. Co.	3,162.05	31.62	3,130.43
2340	Haggart-Wilson L. S. Com. Co.	15,074.75	150.75	14,924.00
2341	Kansas City L. S. Com. Co.	8,292.30	82.92	8,209.38
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2344	Wester Brothers & Smith Com. Co.	13,815.19	138.15	13,677.04
2345	The Stagner, Pieronnet & Wilson L. S. Com. Co.	10,562.18	105.62	10,456.56
2346	Tamblyn Com. Co.	5,159.92	51.60	5,108.32
2347	H. F. Carnes L. S. Com. Co.	477.00	4.77	472.23
2348	Warren Cummings L. S. Com. Co.	12,283.05	122.83	12,160.22
2349	Drumm-Standish Com. Co.	2,843.30	28.43	2,814.87
2350	Link-Faskin			
2351	Long-Perry L. S. Com. Co.	21,639.54	216.40	21,423.14
2352	Knight & Tice Sheep Com. Co.	2,860.60	28.61	2,831.99
2353	W. M. Leiten Sheep Com. Co.	7,851.68	78.52	7,773.16
2354	National L. S. Com. Co.	34,131.03	341.31	33,789.72
2355	Poole-Dempsey-Rutherford L. S. Com. Co.	15,282.90	152.83	15,130.07
2356	Harry Kenalley Com. Co.	3,064.70	30.65	3,034.05
2357	Xhrke-Martin L. S. Com. Co.	9,357.90	93.58	9,264.32
2358	John Clay & Co.	64,234.32	642.34	63,591.98
2359	Wright & Bacus L. S. Com. Co.	10,659.17	106.59	10,552.58
2360	Swift & Henry L. S. Com. Co.	52,980.50	529.81	52,450.69
2361	H. Theis & Sons	5,485.65	54.86	5,430.79
2362	Ham Knighton L. S. Com. Co.	3,961.21	39.61	3,921.60
2363	Laird Brothers L. S. Com. Co.	12,445.90	124.46	12,321.44
2364	Martin, Bloomquist & Lees Com. Co.	33,020.80	330.21	32,690.59
2365	Moffett L. S. Com. Co.	13,269.38	132.69	13,136.69
2366	Jay D. McCormick L. S. Com. Co.	889.84	8.90	880.94
2367	Kile Com. Co.	13,472.65	134.73	13,337.92
2368	Ryan-Robinson Com. Co.	15,750.85	157.57	15,593.28
2369	Welch Livestock Com. Co.	511.39	5.11	506.28
2370	Witherspoon Livestock Com. Co.	20,128.27	201.28	19,926.99
2371	W. E. Curtis & Co.	828.80	8.29	820.51
2372	Greer & Company	2,158.37	21.58	2,136.79
2373	Inman-Hutton L. S. Com. Co.	4,436.10	44.36	4,391.74
2374	Walter G. Land L. S. Com. Co.	759.78	7.57	749.21
2375	Less White L. S. Com. Co.	1,917.71	19.18	1,898.53
2376	Wilson, Egan & Co.	32,295.93	322.96	31,972.97
2377	Cassidy S. W. Com. Co.	16,540.16	165.40	16,374.76
2378	Burlington L. S. Com. Co.	20,410.53	204.11	20,206.42
	Funds deposited with court	\$586,093.32		
	Earnings of 1%		\$5,860.95	
	Net amounts			\$580,232.37

270 In United States District Court

In Equity. No. 2328 and Related Cases Nos. 2329-78

[Title omitted.]

Final decree

Filed June 18, 1938

Come now the said plaintiffs by their attorneys and the defendants by their attorney and the mandate of the Supreme Court of the United States having been filed in this court duly authenticated under the seal of the said Supreme Court and certified by the court thereof,

wherefore it appears that at the October Term of said Supreme Court, on the 25th day of April 1928, upon appeal by the said plaintiffs from the decree of this court, the said Supreme Court entered and pronounced a judgment and decree reversing the decree of this court entered herein on the 9th day of July 1937:

Now, therefore, on the filing of said mandate, and in pursuance thereof, and after hearing the respective parties, it is ordered, adjudged, and decreed, and this court by virtue of the power and authority therein invested, and in obedience to the said mandate, doth adjudge and decree:

1. The decree entered herein on July 9, 1937, is hereby vacated, set aside, and for naught held.

2. The purported order of the defendant, the Secretary of Agriculture of the United States, of June 14, 1933, referred to and made a part of the petitions of the respective plaintiffs as Exhibit 271 "A," and the same is hereby decreed void and of no effect, and is permanently suspended, enjoined, set aside, and annulled, and the defendant, Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors, and agents of the United States, and all other persons acting or claiming or assuming to act, by or under the authority of the defendants, or either of them, are hereby forever restrained and enjoined from instituting, prosecuting, or aiding in instituting or prosecuting any proceeding or action in respect of the enforcement, operation, or execution of said order, and each and every part thereof.

And it is further adjudged and decreed that such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain, and that the parties may apply to this Court upon the foot of this decree for such further orders and directions as may be necessary or seem meet and proper to the court with respect to the funds and moneys so impounded and the costs of this action.

ARBA S. VAN VALKENBURGH,

*Judge of the Circuit Court of Appeals
of the United States for the Eighth Circuit.*

ALBERT L. REEVES, *District Judge.*

MERRILL E. OTIS, *District Judge.*

272

In United States District Court

[Title omitted.]

Petition for appeal

Filed June 29, 1938

To the Honorable Arba S. Van Valkenburgh, Judge of the Circuit Court of the United States for the Eighth Circuit, the Honorable

Merrill E. Otis, Judge of the District Court of the United States for the Western District of Missouri, and the Honorable Albert L. Reeves, Judge of the District Court of the United States for the Western District of Missouri, sitting as a district court for said District, pursuant to section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Tit. 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Tit. 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Tit. 28, Sec. 345):

The United States of America and the Secretary of Agriculture, defendants in the above-entitled cause, considering themselves aggrieved by the final order and decree entered by this Court on June 18, 1938, which granted petitioners' motion for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this
273 Court on July 22, 1933, and extended from time to time thereafter, do hereby pray an appeal from said final order and decree to the Supreme Court of the United States pursuant to section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Tit. 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, Stat. 220; U. S. C., Tit. 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Tit. 28, Sec. 345).

The particulars wherein the defendants consider the order erroneous are set forth in the Assignment of Errors accompanying this petition and to which reference is hereby made.

Said defendants pray that their appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

MAURICE M. MILLIGAN,

United States Attorney,

THURMAN ARNOLD,

Assistant Attorney General,

WENDELL BERGE,

Special Assistant to the Attorney General,

For the United States of America.


This 27 day of June 1938.

Service of the foregoing Petition for Appeal and the receipt of a copy thereof are hereby acknowledged this 29 day of June 1938.

FREDERICK H. WOOD,

JOHN B. GAGE,

Solicitors for Petitioners.



[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Assignment of errors

Filed June 29, 1938

The United States of America and the Secretary of Agriculture, defendants in the above-entitled cause, in connection with their petition for an appeal to the Supreme Court of the United States, hereby assign error to the record and proceedings and to the entry of the final order and decree of said District Court on the 18th day of June, 1938, in the above-entitled cause, and say that said decree is erroneous and to the prejudice of said defendants in the following particulars:

1. The Court erred in denying defendants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the Court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 1, 1938, and such final order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction.

2. The Court erred in granting petitioners' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said Court on July 22, 1933, and extended from time to time thereafter.

3. The Court erred in holding that as a matter of law the funds now impounded in the custody of the Clerk belong to petitioners.

4. The Court erred in holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to petitioners.

5. The Court erred in holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933 and November 1, 1937.

6. The Court erred in directing the distribution to petitioner of the said impounded moneys prior to a determination upon the merit by the Secretary of Agriculture or by the Court of the ultimate ownership of said moneys.

7. The Court erred in directing the distribution to petitioners of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by petitioners from their patrons.

276 8. The Court erred in failing to hold that the funds now impounded in the custody of the Clerk should be retained in the custody of the said Clerk until such time as the Secretary of Agriculture, acting with due expedition, shall have made a final order, dated as of June 14, 1933, fixing the reasonable rates and charges to be charged by the petitioners for the period between July 24, 1933, and November 1, 1937.

9. The Court erred in failing to enter such order or orders with respect to the impounded funds as was and is consistent with right and justice and the laws of the United States.

MAURICE M. MILLIGAN,
United States Attorney,

THURMAN ARNOLD,
Assistant Attorney General,

WENDELL BERGE,
Special Assistant to the Attorney General.
Solicitors for Defendants.

This 27 day of June, 1938.

Service of the foregoing Assignment of Errors and the receipt of a copy thereof are hereby acknowledged this 29th day of June 1938.

FREDERICK H. WOOD,

JOHN B. GAGE,

Solicitors for Petitioners.

277

In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Notice to the Attorney General of the State of Missouri

Filed June 29, 1938

*To the Honorable the Attorney General of the State of Missouri, at
Jefferson City, Missouri:*

Pursuant to the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220-221; U. S. C. Tit. 28, sec. 47a), you are hereby notified that the defendants in the above-entitled cause have taken an appeal to the Supreme Court of the United States from the final decree of the District Court of the United States for the Western District of Mis-

souri, entered on June 18, 1938. The order allowing appeal makes the same returnable within 40 days from the date thereof.

MAURICE M. MILLIGAN,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
WENDELL BERGE,

*Special Assistant to the Attorney General,
For the United States of America.*

This 27th day of June, 1938.

278 Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 28th day of June 1938.

ROY MCKITTRICK,
Attorney General, State of Missouri.

279 In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Order allowing appeal

Filed June 30, 1938

In the above-entitled cause the United States of America and the Secretary of Agriculture, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 18th day of June 1938, which granted petitioners' motion for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter, and having also made and filed an Assignment of Errors and a Statement of Jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

ARBA S. VAN VALKENBURGH,
Judge of the Circuit Court.

ALBERT L. REEVES,
Judge of the District Court.

MERRILL E. OTIS,
Judge of the District Court.

This 30th day of June 1938.

280 Service of the foregoing Order Allowing Appeal and the receipt of a copy thereof are hereby acknowledged this 30 day of June 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Solicitors for Petitioners.

In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Præcipe for transcript of record

Filed June 30, 1938

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of appeals therein and include in said transcript in the order given below the following matters, viz:

1. Petition filed by F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company, in the United States District Court for the Western District of Missouri on July 19, 1933;

2. Defendants' answer to said petition, dated November 25, 1933;

3. Statement as to petitions filed in cases Nos. 2329 to 2378, inclusive.

4. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934;

5. Decree of the said District Court, dated December 20, 1934;

6. Petition for rehearing filed in the said District Court.

284 7. Order, dated January 2, 1935, granting leave to file petition for rehearing;

8. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing;

9. Stipulation, dated June 15, 1935, as to consolidation of causes;

10. Order, dated June 15, 1935, consolidating causes.

11. Mandate of the Supreme Court of the United States, dated May 25, 1936;

12. Supplemental answer of defendants, dated July 11, 1936;

13. Amended application of petitioners for leave to amend petitions, dated September 17, 1936.

14. Order, dated November 6, 1936, granting leave to amend petitions;

15. Defendants' answer, dated December 4, 1936, to petitions as amended;

16. Opinions of the said District Court, dated July 2, 1937;

17. Decree of the District Court dated July 9, 1937;

18. Temporary restraining order dated July 22, 1933;

19. Order dated September 19, 1933, continuing temporary restraining order;

20. Order dated June 20, 1935, denying petitions for rehearing and entering joint and final decree in cases as consolidated;

21. Order dated August 16, 1937, continuing temporary restraining order and staying operation of order of Secretary of Agriculture dated June 14, 1933, pending appeal to the Supreme Court of the United States from the said District Court's decree of July 9, 1937;

22. Mandate of the Supreme Court of the United States dated June 3, 1938;

285 23. Defendants' motion, dated June 11, 1938, for an order staying further proceedings in the above-entitled cause and requesting the retention by the Clerk of the said District Court of moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, continued from time to time thereafter by further orders of the said Court, until such time as the Secretary proceeding with due expedition shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction;

24. Petitioners reply to defendants' aforesaid motion;

25. Answer of New Amsterdam Casualty Company, substituted for Harry J. Kennaley, to defendants' aforesaid motion;

26. Petitioners' motion dated June 11, 1938, for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter;

27. Opinion entered in the said District Court on June 18, 1938, by Circuit Judge Arba S. Van Valkenburgh and District Judges Albert L. Reeves and Merrill E. Otis;

28. Final order and decree entered by said District Court on June 18, 1938;

29. Final decree of said District Court dated June 18, 1938, setting aside its former decree of July 9, 1937, and permanently enjoining the order of the Secretary of Agriculture dated June 14, 1933;

30. Defendants' petition for appeal to the Supreme Court of the United States;

31. Said District Court's order allowing appeal to the Supreme Court of the United States;

286 32. Defendants' assignment of errors filed with said petition for appeal;

33. Notice of appeal to Roy McKittrick, Attorney General of the State of Missouri;

34. Defendants' praecipe for record on appeal and acknowledgment of service thereon;

35. Citation and writ of service;

36. Any orders of this Court not herein enumerated subsequent to the filing of the aforesaid mandate of the Supreme Court of the United States.

MAURICE M. MILLIGAN,
United States Attorney,

THURMAN ARNOLD,
Assistant Attorney General,

WENDELL BERGE,
Special Assistant to the Attorney General,

Solicitors for the defendants.

287 Services of the foregoing Praecipe for Transcript of Record
and the receipt of a copy thereof are hereby acknowledged this
30th day of June 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Solicitors for Appellees.

Filed in the United States District Court June 30, 1938.

288 In United States District Court

[Title omitted.]

In Equity. No. 2328 and Nos. 2329-2378

Stipulation re Exhibit No. 24

Filed July 16, 1938

It is hereby stipulated and agreed that Exhibit No. 24 offered by appellees in the administrative proceedings, being copy of "Arbitrators' Award in Dockets 11, 12, 13, and 14," be included in and made a part of the transcript of record to be certified by the Clerk in the above entitled proceeding.

Dated July 14, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Attorneys for Appellees.
WENDELL BERGE,
Attorney for Appellants.

289 UNITED STATES DEPARTMENT OF AGRICULTURE,
PACKERS AND STOCKYARDS ADMINISTRATION,
Washington, D. C., July 31, 1923.

The Honorable THE SECRETARY OF AGRICULTURE.

SIR: We submit, herewith, the report and the award of the arbitrators in Docket Nos. 11, 12, 13, and 14.

(Signed) G. N. DAGGER.

(Signed) HOWARD M. GORE.

Docket Nos. 11, 12, 13, and 14

AMERICAN NATIONAL LIVE STOCK ASSOCIATION, NATIONAL WOOL GROWERS' ASSOCIATION, ARIZONA CATTLE GROWERS' ASSOCIATION, ARIZONA WOOL GROWERS' ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CORN BELT MEAT PRODUCERS' ASSOCIATION, IDAHO CATTLE AND HORSE GROWERS' ASSOCIATION, MONTANA STOCK GROWERS' ASSOCIATION, NEBRASKA STOCK GROWERS' ASSOCIATION, NEVADA LAND AND LIVE STOCK ASSOCIATION, NEW MEXICO CATTLE AND HORSE GROWERS' ASSOCIATION, OREGON CATTLE AND HORSE RAISERS' ASSOCIATION, TEXAS AND SOUTHWESTERN CATTLE RAISERS' ASSOCIATION, UTAH CATTLE AND HORSE GROWERS' ASSOCIATION, WYOMING STOCK GROWERS' ASSOCIATION, COMPLAINANTS

v.

THE CHICAGO LIVE STOCK EXCHANGE, THE KANSAS CITY LIVE STOCK EXCHANGE, THE OMAHA LIVE STOCK EXCHANGE, THE ST. PAUL LIVE STOCK EXCHANGE, THE PORTLAND LIVE STOCK EXCHANGE; AND THOSE MARKET AGENCIES OPERATING AT THE STOCKYARDS AT CHICAGO, ILL.; KANSAS CITY, MO.; OMAHA, NEBR.; ST. PAUL, MINN.; PORTLAND, ORE.; AND FORT WORTH, TEXAS, THAT HAVE REGISTERED WITH THE SECRETARY OF AGRICULTURE UNDER SECTION 303 OF THE PACKERS AND STOCKYARDS ACT, 1921, DEFENDANTS

Report and Award of the Arbitrators Recommended to the Secretary of Agriculture

A formal complaint was filed with the Secretary of Agriculture on July 25th, 1922, under Title III of the Packers and Stockyards Act, 1921. This complaint alleges, among other things, that the commission charges assessed and collected by the market agencies for selling livestock at the stockyards located at Kansas City, Mo., So. Omaha, Neb., So. St. Paul, Minn., and Chicago, Ill., are unjust, unreasonable, and discriminatory.

Before a date of hearing was ordered on this complaint, a conference was held between the representatives of the market agencies at the Kansas City market and representatives of the American National Livestock Association, Kansas Livestock Association, Missouri Livestock Association, Texas and Southwestern Cattle Raisers' Association, and other livestock organizations tributary to that market. This conference resulted in a proposal to the Secretary that the issues in dispute be settled by arbitration. The conference nominated arbitrators for the consideration of the Secretary in connection with this proposal. The proposed plan was approved by the Secretary of Agriculture. All parties to the proceedings and participants in the conferences in relation thereto, with the approval and consent of the Secretary, joined in an invitation to those nomi-

noted by them to act in the capacity of arbitrators under the following stipulation:

"In conference in regard to the matter of rates, charges, regulations, and practices now in force at the Kansas City market, it is proposed that all questions in regard to the above subject matter shall be submitted for adjustment to G. N. Dagger, Charge of the Division of Rates and Charges, and Howard M. Gore, Charge of Trade Practice Division, Packers and Stockyards Administration, and it is agreed that their decision shall be accepted and made a part of the conference report, the same to be made effective by the Kansas City Live Stock Exchange upon approval by the Secretary of Agriculture. In performance of these duties, G. N. Dagger and Howard M. Gore may proceed in such manner and by such means as they deem necessary, and shall be afforded such facilities and information as they may require for the proper discharge of their duties. And in order to effectuate the results of this conference, it is understood that the representatives of the commission men market agencies, the American National Live Stock Association, the National Wool Growers' Association, and the producers organizations, namely: Kansas State Live Stock Association, Texas and South Western Cattle Raisers' Association, Missouri Live Stock Association, and representatives of Oklahoma Live Stock Producers participating in this conference will approve this stipulation."

292 The persons chosen and named in the stipulations accepted the invitation to act as arbitrators and entered upon their duties as such. The arbitrators were aware that the tasks to be undertaken were in the nature of pioneer work and the complex character of the problems presented would necessitate extensive research and study. It was the opinion of the arbitrators that the problem could best be approached by informal conferences and hearings with the representatives of the producers and shippers and with the market agencies engaged in business at the market under consideration. It was the further belief of the arbitrators that the Auditing Division of the Packers and Stockyards Administration should make an examination of the records of these market agencies and report the facts developed to the arbitrators.

The arbitration plan of settling the questions at issue for St. Paul, Omaha, and Chicago was adopted in January 1923. The complainants and respondents at Omaha and St. Paul adopted the form of the Kansas City stipulation. A separate stipulation was entered into for Chicago, which reads as follows:

"It is hereby agreed between the complainants in the above entitled complaint and The Chicago Live Stock Exchange and all market agencies, members thereof, who are made defendants to said complaint, as follows:

"1. In lieu of the formal procedure and hearing provided for by the Packers and Stockyards Act, 1921, for the consideration and determination of the charges made in said complaint by the American

National Live Stock Association and others against The Chicago Live Stock Exchange and others, the entire subject matter and charges in said complaint, contained shall be investigated by G. N. Dagger, in charge of the Division of Rates and Charges of said Packers and Stockyards Administration; and Howard M. Gore, in charge of the Trade Practice Division of said Packers and Stockyards Administration, with full authority in said G. N. Dagger and Howard M. Gore, as arbitrators, to finally adjust and determine the issue raised by said complainants in their complaint against said Chicago Live Stock Exchange and the market agencies at the Chicago market.

295 "2. Upon the signing of this stipulation by the parties hereto, the schedule of rates and charges now on file with said Packers and Stockyards Administration shall remain in effect until the decision of said arbitrators is approved by the Secretary of Agriculture, and none of the parties hereto shall take any action in respect to the matters charged and referred to in said complaint pending the determination thereof by said arbitrators, for the purpose of concluding the proceedings instituted by the complainants.

"3. In performing their duties as such arbitrators, said G. N. Dagger and Howard M. Gore shall proceed in such manner and by such means as they deem necessary and proper and shall be extended by the complainants and these defendants all facilities and give all information as they may request and as in their judgment necessary for the proper discharge of their duties as such arbitrators and to enable them to fairly determine what shall be regarded as just and reasonable practices and schedules of rates and commission charges in the livestock commission business at the Chicago market.

"4. It is understood that the decision of such arbitrators upon the matters herein referred to shall be binding upon, and shall be accepted by all of the parties to the complaint, and that the rates and charges and practices found to be just and reasonable by said arbitrators and recommended by them shall be adopted by said Chicago Live Stock Exchange and the members thereof, upon approval by the Secretary of Agriculture, and shall be made effective to the same extent and as fully as if such decision and recommendations had been arrived at by the Secretary of Agriculture as the result of a formal hearing in accordance with the procedure provided by said Packers and Stockyards Act, 1921.

"5. The practices and rates and charges found to be just and reasonable by said arbitrators and recommended by them for adoption, if approved by the Secretary of Agriculture, shall be adopted by all of the market agencies at the Chicago market and enforced by the Packers and Stockyards Administration.

"6. No publicity shall be given to the information gathered by said arbitrators by either the complainants or the defendants herein and no public statements or interviews with respect thereto given out, unless by authority or direction of said arbitrators.

"7. That this stipulation shall be executed in quadruplicate and one copy given to each of the following:

"(a) The Chief of the Packers and Stockyards Administration.

"(b) Messrs. G. N. Dagger and Howard M. Gore; the arbitrators.

"(c) The duly authorized representative of the complainants.

"(d) The President of The Chicago Live Stock Exchange.

294 "8. The investigation by the arbitrators herein shall commence as soon as conveniently possible after the execution of this stipulation and shall be concluded within such reasonable time as the circumstances will permit.

"9. The recommendations, conclusions, and decisions of said arbitrators shall be reduced to writing and a copy thereof filed with the Packers and Stockyards Administration and a copy thereof delivered to the representative of the complainants and the President of The Chicago Live Stock Exchange. Such recommendations as to practices, rates, and schedules of commission charges and otherwise, as may be contained in said decision and report, when approved by the Secretary of Agriculture, shall be adopted by said Chicago Live Stock Exchange and the market agencies at the Chicago market and made effective as soon as conveniently possible after the receipt by the president of The Chicago Live Stock Exchange of said report of the arbitrators, or at such time as shall be directed by said arbitrators."

An informal public hearing was held in the Kansas City market during the week of October 30th, 1922. During the week of February 19th, 1923, an informal public hearing was had at St. Paul, Minn. The hearing at Chicago was held during the week beginning March 5th, 1923, which was resumed March 30th, 1923. The hearing at Omaha was held during the week beginning March 26th, 1923. These informal public hearings held by the arbitrators at the respective markets were widely announced and full opportunity was given to all interested parties to present information and suggestions bearing upon the reasonableness of the present commission charges. Market agencies, individual producers, and representatives of livestock organizations were present at all the hearings and submitted their views and recommendations to the arbitrators. Exhibits were submitted setting forth statistical data and other information bearing on the issue. A complete record was made of these proceedings. An invitation was extended to those present at the hearings and all others interested to present to the arbitrators any facts which in their
295 judgment merited consideration at any time before the making of the final award.

The arbitrators found it necessary to make extensive investigations and study on their own account in order to secure needed information. The Auditing Division of the Packers and Stockyards Administration made such audit of the books of all the market agencies at the four markets involved as the time at hand would permit and furnished information relative to the profits and losses for each firm for a period of time sufficient to indicate the state of the business.

The Auditing Division also secured and furnished information in regard to the character of the receipts of the different classes of live stock at each of the markets. The plan followed in collecting information of this character was to select representative months to show the number of head per car, drafts per car, buyers per car, gross sales weight per car, commission per car, and other expenses, and such other information as would be useful. Numerous conferences were held with officials of livestock exchanges, officials of livestock organizations, and other informed persons. A questionnaire was sent to each market agency which was designed to secure information bearing upon the volume of business handled during the year 1922, the number of employees engaged by each firm, the salary paid each, and such other information as would clearly disclose the nature of their organizations and their business operations.

In order to thoroughly familiarize themselves with local conditions prevailing at the several markets in question, the arbitrators made extensive personal investigations, spending considerable time in observing market transactions in the yards.

296 Various reports and letters bearing information and suggestions were received from individuals interested in commission rates. The information submitted by the interested parties, as well as information secured in other ways, has been carefully reviewed. All the documents, letters, and other papers submitted, including the record of the hearings, are on file with the Packers and Stockyard Administration.

In approaching their duties the arbitrators have been cognizant of the situation of the livestock producer and the economic conditions which have confronted him during the past three years. They have also recognized that the welfare of the livestock industry is of mutual interest to the producer, the consumer, and intermediate agencies, and that it is desirable, therefore, to maintain marketing costs on as low a basis as is consistent with efficient service.

It is a noteworthy fact that the manner in which livestock is shipped to market has materially changed during the past few years. Also the methods of purchasing livestock have undergone material change. Market agencies are confronted with the necessity of meeting the changing conditions without lowering the efficiency of their service. It has been the usual custom on the part of the producer or shipper to ship his animals in carload lots, with seldom more than one owner, but with the development of cooperative shipping a very large percentage of the shipments of livestock at the four markets under consideration is owned by two or more persons, frequently the owner numbering as high as fifteen and twenty to the car. The

297 method of shipping necessitates a marked departure from the usual method of selling and accounting for livestock to the producers and shippers.

In the purchase of livestock in the market the buyers representing the larger packers are usually in close touch with their chief buyers.

who is generally located in Chicago. He keeps in close touch with the buyers of his concern in the various markets and apparently directs in considerable detail the purchases of the various representatives on the several markets. It appears that the larger purchasing concerns have adopted the policy of employing representatives who specialize in the purchase of market grades and classes. The average buyer to-day representing a packer, either at the market place or elsewhere, is usually looking for animals to fill a definite place in the course of business of that concern. In order to determine properly market value, broadly speaking, the buying conditions found at the several markets require that market agencies be informed as to the receipts of livestock at the various important markets, the prospective supply of livestock, the condition of the fresh and cured meat trade, the volume of various packing house products going into consumptive channels, the needs of the local packing plants, demand of buyers from other centers, and be in possession of information concerning the many other factors that enter into the establishing of the trading basis of a given market from time to time. A selling agency at a market center, in addition to being posted on general trade conditions, must be a judge of both the quality of the various classes of livestock and their market value at the time of sale.

298 It is conceded by all parties that the improper loading at the time of shipment and improper handling of animals in transit, neglect in properly caring for and feeding the animals upon arrival at the market, lack of information or selling ability on the part of the market agencies, neglect in safeguarding other interests of the shipper, may reflect themselves materially in the net return to the shipper or producer.

In reaching a conclusion as to what, in their judgment, will be a fair charge for the producer to pay and a fair compensation to the market agencies for the services rendered, the arbitrators have in mind that it is not within their province to pass on the question of whether a firm has a right to act as a market agency, but they have approached it from the standpoint that the compensation should be reasonably remunerative to those efficiently functioning as market agencies. It would not be to the advantage of the livestock producer to bring about arbitrarily such conditions as to cause necessary talent to seek a field for its services other than with a livestock market agency. It appears that the producer and the shipper should be the best judges as to the quality of service furnished them by the several market agencies and as to whether the service is satisfactory. It is entirely within the power of the patrons of the market to withhold patronage from those market agencies that fail to give satisfactory service. Herein lies an effective means, available to the shipper, of improving market services.

At the four markets involved the shipper may avail himself of the services of the "old line" commission firms or cooperative commission agencies. In addition, if the shipper or producer desires to

offer his livestock for sale in person, the facilities of the market center for receiving, caring for, and making delivery of his livestock are available to him. This condition offers the producer a choice of methods of selling his livestock and the compensation that he shall pay therefor. The Bureau of Agricultural Economics is constantly represented at the market centers and prepares and disseminates, from day to day, carefully analyzed reports of the market conditions on classes and grades of all species of livestock. A similar service is performed by daily market papers and other marketing organizations. From these agencies producers and shippers can inform themselves as to the market conditions under which livestock is being handled.

In approaching the determination of the reasonableness of commission rates for handling livestock at the stockyards, it is apparent, both from information and observation, that while the judicious employment of limited capital is necessary, yet capital as such is not a material income-producing factor. The commission business is essentially personal in the character of the service performed. The relation between the market agency and its customers is primarily a personal one. The useful market agency must always be alert in observing and sensing those factors which enter into the making of market prices from day to day and hour to hour. Constant attention to the maintenance of the highest kind of personal service in behalf of shippers must be exercised at all times. The sound business judgment and integrity of the market agency is of prime importance to the producer and shipper. The selling of the producer's livestock to persons with the ability to pay, collecting, safeguarding, and remitting the proceeds to the shipper, are important factors that enter into an adequate service. With these facts in mind, the arbitrators believe the livestock industry will be benefited by the maintenance of the highest quality of service at the market centers.

The arbitrators have considered the commission business strictly on its merits and apart from other activities engaged in by commission firms. In taking this view, it is not their thought that those associated enterprises are not proper activities for those engaged in the commission business, or that they are not beneficial to very many producers, but it is their conclusion that the matter of rate should be considered strictly from the viewpoint of the commission business as such. Very many services beneficial to the producer are, and even to an enlarged degree can be, performed by the market agencies in addition to the strict duties of selling and accounting for livestock.

In respect to market and financial risks to which market agencies are exposed, insurance against many of these losses has been devised and is offered to market agencies at a comparatively nominal fee. The market agency bears many risks against which there is no insurance or protection, and at the same time is financially responsible to

the shipper. Moreover, it is apparent that market agencies must meet the general economic conditions that prevail in respect to wages, cost of equipment, and such other elements as are essential in the conduct of their business.

It is the opinion of the arbitrators that market agencies which conduct a reasonably efficient business should not be arbitrarily denied a reasonable margin of profit for the capital, responsibilities, and risks involved. The conclusions reached are based upon
 301 what appears to be the basis upon which a well organized commission firm with a reasonable volume of business can operate efficiently, maintaining a high character of service and giving opportunity for reasonable profit.

Many suggestions have been received proposing changes in the methods of assessing and collecting commission charges, but the present form in which shipments are received at the markets renders it inadvisable to make any radical departures. In the present schedules of commission charges there are features which the arbitrators deem advisable to change, believing that their present operation is not entirely equitable. No departure has been made except after full and careful deliberation. The arbitrators are aware that should any of the proposed changes prove to be impracticable, relief may be had upon a proper showing to the Secretary.

The arbitrators are cognizant of the fact that it is difficult to arrive at an exact figure where so many complex services are required. However, after considering all the factors and problems involved, the arbitrators conclude that the schedule of rates and charges hereinafter set forth for the markets under consideration will reasonably compensate market agencies engaged in the sale of livestock, on a commission basis for the services performed and the producer and shipper of livestock will not pay more than a reasonable charge for the services required. It is therefore recommended for the approval of the Secretary that the schedules of rates and charges now in effect at the markets concerned be amended to comply with the following provisions and put into full force and effect as promptly as circumstances will permit.

302 CHICAGO SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, \$17.00—and 75c per head for each additional head over 20 head, with a maximum of \$21.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$17.00—and 30c per head for each additional head over 50 head, with a maximum of \$22.00.

Double-deck

70 head or less, \$23.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$28.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$13.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$15.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$18.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$23.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds. When a car contains less than 40 head, the "drive-in" schedule applies.

Sheep—Single-deck, \$14.00

Double-deck, \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

303

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	85¢	\$21.00	
Calves.....	35¢	22.00	\$28.00
Hogs.....	25¢	15.00	23.00
Sheep.....	20¢	14.00	20.00

Minimum of \$16.00, and maximum of \$26.00, on single-deck car.

Minimum of \$21.00, and maximum of \$29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$17.00 and the maximum \$24.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply.

304

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	85¢	\$18.00	\$22.00		
Calves.....	35¢	18.00	23.00	\$24.00	\$29.00
Hogs.....	25¢	14.00	16.00	19.00	24.00
Sheep.....	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	85¢	\$22.00	
Calves.....	35¢	23.00	\$29.00
Hogs.....	25¢	16.00	24.00
Sheep.....	20¢	16.00	22.00

Minimum of \$17.00, and maximum of \$26.00, on single-deck car.

Minimum of \$22.00, and maximum of \$29.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$18.00 and the maximum \$24.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock driven or hauled in

The rates of the present Chicago "drive-in" schedule will apply.

305

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet a charge of 5¢ extra shall be made for each statement.

306 KANSAS CITY—SELLING COMMISSIONS—SINGLE OWNERSHIP—
CARLOAD LOTS

Cattle

20 head or less, \$15.00—and 65¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00.

An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head the "drive-in" schedule applies.

307

Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75c	\$19.00	
Calves.....	35c	20.00	\$26.00
Hogs.....	25c	14.00	22.00
Sheep.....	20c	14.00	20.00

Minimum of \$15.00 and maximum of \$25.00, on single-deck car.

Minimum of \$20.00 and maximum of \$28.00, on double-deck car:

When a car contains cattle and calves only, the minimum shall be \$15.00 and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification, and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

308

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75c	\$16.00	\$20.00		
Calves.....	35c	16.00	21.00	\$22.00	\$27.00
Hogs.....	25c	13.00	15.00	18.00	24.00
Sheep.....	20c	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75c	\$20.00	
Calves.....	35c	22.00	\$27.00
Hogs.....	25c	15.00	23.00
Sheep.....	20c	16.00	22.00

Minimum of \$16.00 and maximum of \$25.00, on single-deck

Minimum of \$21.00 and maximum of \$28.00, on double-deck

When a car contains cattle and calves only, the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single owner carloads.

Stock Driven or Hauled In

The rates of the present Kansas City "drive-in" schedule apply.

309

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the market prorated sheet, a charge of 5¢ extra shall be made for each statement.

310 OMAHA—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOADS

Cattle

20 head or less, \$15.00—and 70¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head, the "drive-in" schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head, the "drive-in" schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00. An additional charge of 30¢ shall be made for each full 500 pounds weight over 27,000 pounds.

When a car contains less than 40 head, the "drive-in" schedule applies.

311 Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 40 head, the "drive-in" schedule applies.

Mixed Livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$19.00	
Calves.....	35¢	20.00	\$26.00
Hogs.....	25¢	14.00	22.00
Sheep.....	20¢	14.00	20.00

Minimum of \$15.00, and maximum of \$25.00, on single-deck car.

Minimum of \$20.00, and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$15.00, and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural Owner Car Lots—Sold as Single Ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural Owner Car Lots Handled for Ownership, Marks, Brands, or Other Identification

When carloads of livestock require prorating, separate sorting, selling, or weighing for ownership, marks, brands, or other identification, or at request of shippers, the following rates shall apply.

312

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75¢	\$16.00	\$20.00		
Calves.....	35¢	16.00	21.00	\$22.00	\$27.00
Hogs.....	25¢	13.00	15.00	18.00	23.00
Sheep.....	20¢	14.00	16.00	20.00	22.00

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$20.00	
Calves.....	35¢	21.00	\$27.00
Hogs.....	25¢	15.00	23.00
Sheep.....	20¢	16.00	22.00

Minimum of \$16.00 and maximum of \$25.00, on single-deck car.

Minimum of \$21.00, and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only, the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

The rates of the present Omaha "drive-in" schedule shall apply.

313

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual account sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

ST. PAUL—SELLING COMMISSIONS—SINGLE OWNERSHIP—CARLOAD LOTS

Cattle

20 head or less, \$15.00—and 65¢ per head for each additional head over 20 head, with a maximum of \$19.00.

When car contains less than 14 head, the “drive-in” schedule applies.

Calves—Single-deck

50 head or less, \$15.00—and 30¢ per head for each additional head over 50 head, with a maximum of \$20.00.

Double-deck

70 head or less, \$21.00—and 30¢ per head for each additional head over 70 head, with a maximum of \$26.00.

When car contains less than 40 head, the “drive-in” schedule applies.

Hogs—Single-deck

50 head or less, \$12.00—and 15¢ per head for each additional head over 50 head, with a maximum of \$14.00. An additional charge of 0¢ will be made for each full 500 pound weight over 17,000 pounds.

Double-deck

80 head or less, \$17.00—and 15¢ per head for each additional head over 80 head, with a maximum of \$22.00. An additional charge of 0¢ will be made for each full 500 pounds weight over 27,000 pounds.

When car contains less than 40 head, the “drive-in” schedule applies.

Sheep—Single-deck \$14.00

Double-deck \$20.00

When a car contains less than 50 head, the "drive-in" schedule applies.

Mixed livestock

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$19.00	
Calves.....	35¢	20.00	
Hogs.....	25¢	14.00	
Sheep.....	20¢	14.00	

Minimum of \$15.00, and maximum of \$25.00, on single-deck cars.

Minimum of \$20.00; and maximum of \$28.00, on double-deck cars.

When a car contains cattle and calves only, the minimum shall be \$15.00 and the maximum \$22.00.

SELLING COMMISSION—PLURAL OWNERSHIP—CARLOAD LOTS

Plural owner car lots—Sold as single ownership

When plural ownership carload lots of livestock are handled in the same manner as single ownership cars—that is, not weighed for ownership, marks, brands, or other identification and not prorated, but handled for market grades and classes only—the single ownership schedules shall apply.

Plural owner car lots handled for ownership, marks, brands, or other identification

When carloads of livestock require prorating, separate sorting, weighing, or weighing for ownership, marks, brands, or other identification, or at request of shipper, the following rates shall apply:

Unmixed Cars

	Per head	Single-deck		Double-deck	
		Minimum	Maximum	Minimum	Maximum
Cattle.....	75¢	\$16.00	\$20.00		
Calves.....	35¢	16.00	21.00	\$22.00	
Hogs.....	25¢	13.00	15.00	18.00	
Sheep.....	20¢	14.00	16.00	20.00	

Mixed Cars

	Per head	Single-deck maximum	Double-deck maximum
Cattle.....	75¢	\$20.00	
Calves.....	35¢	21.00	
Hogs.....	25¢	15.00	
Sheep.....	20¢	16.00	

Minimum of \$16.00 and maximum of \$25.00, on single-deck car.

Minimum of \$21.00 and maximum of \$28.00, on double-deck car.

When a car contains cattle and calves only the minimum shall be \$16.00 and the maximum \$22.00.

Under this schedule no owner shall pay more than the maximum commission and extra service charges, if any, on single ownership carloads.

Stock Driven or Hauled In

For St. Paul, the "drive-in" schedule shall be: cattle, 80¢ per head; calves, 40¢ per head; hogs, 30¢ per head; and sheep and goats, 20¢ per head.

EXTRA SERVICES

Drafts

1. Single Ownership.—When requested or necessary to grade or sort car lots of livestock of single ownership into market grades and classes, a charge of 15¢ shall be made for each draft over three drafts per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$2.00.

2. Plural Ownership.—When requested or necessary to grade or sort car lots of livestock of plural ownership for ownership, market grades and classes, brands, marks, or other identification, a charge of 15¢ per draft shall be made for each draft over three per deck—each draft to be represented by a separate scale ticket. Maximum charge, \$3.00.

Prorating

When prorating is done a charge of 25¢ for each owner shall be made, with a minimum charge of \$1.00 and a maximum charge of \$2.50 for this service.

Individual Account Sales

When individual statements are requested in addition to the master prorate sheet, a charge of 5¢ extra shall be made for each statement.

318 If circumstances arise under which more than one interpretation of the schedules might be applied, that interpretation which is most favorable to the shipper shall be used.

The revised schedules contemplate a basic charge for those shipments requiring a uniform service and additional charges for those shipments requiring services in addition to the usual standard service. The draft charge is designed to operate when more than the ordinary amount of sorting, grading, and weighing for ownership and market grades and classes is necessary. The prorating charge is to compensate for a complete accounting of each owner's livestock in a plural ownership shipment. If, in addition, a separate statement for each owner is rendered, then an additional charge is provided for this

service. The amount that can be collected for these special services has been carefully limited and the charges can be assessed only to the extent that the services are utilized. This makes it possible for all shippers to get the benefit of the basic charge when the character of their shipments does not require this extra service. The shippers are thus relieved from paying for services not necessary to the proper marketing of their shipments.

It is the recommendation of the arbitrators that the schedules revised in accordance with the above provisions should be observed by all market agencies engaged in business at each of the markets involved and that no departure from the established schedule should be made except after an actual demonstration by a market agency that it can successfully and efficiently operate under a different schedule than the one herein proposed. A showing for such departure should be based on the facts concerning the operations of the concern which seeks to change its schedule.

319 The arbitrators are duly appreciative of the confidence reposed in them, and if substantial justice results from their efforts they will be gratified at this opportunity to have served the industry.

In carrying out their duties the arbitrators have found it necessary to avail themselves of the assistance of many of those engaged in the various phases of producing and marketing livestock. This assistance has been freely and cordially given by the market agencies and their staffs, the producers and their representatives, the staff of the Packers and Stockyards Administration, and by many others engaged in the industry. For the cooperation and assistance given, the arbitrators desire to express their appreciation and to accord a full measure of credit.

(Signed) G. N. DAGGER.

(Signed) HOWARD M. GORE.

Date of Award July 24th, 1923.

Approved by Authority of Secretary Henry C. Wallace.

(Signed) C. W. PUGSLEY,

Acting Secretary.

United States Department of Agriculture.

JULY 27, 1923.

320

In United States District Court

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS,
District Judges

Opinion of the court

Filed October 29, 1934

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after final hear-

ing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges for services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme Court (*Tagg Bros. v. United States*, 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

321 (a) May determine and prescribe what will be just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6721 typewritten pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an

"Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3091 typewritten pages in addition to which 11 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." Thereafter, on June 14, 1933, the Secretary of Agriculture made and issued findings of facts and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock bought or sold; the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 322 1 to 20 head and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned, and the petitioners have made all of them save one. They are: (1) That the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that erroneous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros. v. United States*, supra; *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 454.

The Procedure

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." See 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence, but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate the obvious observation that the

theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

Findings Support Order

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that these findings support the order. Unquestionably they do support the order, and that fully.

Findings Supported by Evidence

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the efficient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive if the evidence before him was legally sufficient to maintain them." *Tagg Bros. v. United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate, and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings.

That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

Claimed Errors of Law

It is true that such an order as the one here attacked must be set aside if it rests upon an erroneous rule of law. *Tagg Bros. v. United States*, 280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following:

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

325 C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not that they had cost) \$66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

Confiscation

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court, never has finally been decided by the Supreme Court. *Tagg Bros. v. United States*, 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company v. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679, 689; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 50; *Lehigh Valley R. Co. v. Board of Public Utility Co.*, 278 U. S. 24, 26; *United Railways & Electric Co. v. West*, 289 U. S. 234, 251; *Phillips v. Commissioner*, 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers and Stockyards Act refers and by *United States v. Louisville and N. E. Co.*, 235 U. S. 314, 320; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 547, and the dissenting opinion in *Ohio Valley Water Works Co. v. Ben Avon Borough*, 253 U. S. 287, 297, as well as by the declination of the Supreme Court to pass upon the matter in *Tagg Bros. v. United States*, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. *Darnell v. Edwards*, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for

costs and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings, then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital of petitioners, which is 6% on fixed capital and 7% on working capital, as a matter of law is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these 327 cases. Only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are efficiently conducted, the issue of confiscation must be resolved against the petitioners.

Other Matters

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

Findings of Fact

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the court at the trial of these cases the Court adopts as its findings of fact the findings of fact made by the Secretary and by reference incorporates them herein.

Conclusions of Law

The Court concludes as matters of Law:

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

Indicated Decree

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

[File endorsement omitted.]

In United States District Court

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

Concurring opinion

Filed October 29, 1934

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?
2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically

conceded, the insistence being that the Secretary's allowance of cost is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for this purpose. Capable men cannot be picked up at will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring and the service they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making of his market. The same applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of records and briefs indicates that in various ways the agencies have striven to keep costs down. Obviously it was to their interest 330 to do so in years lean at the best. Their judgment as to the necessities should not be lightly set aside nor under-estimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising, circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal-trade territory. The market agencies have to compete with other stock markets, with co-operatives, a percentage of whose profits go back to their members with packers and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most val-

able operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock-market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

My reaction to the presentation made is that I should have 331 made a more liberal allowance for costs and owner return—not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and, provided further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as "a tribunal appointed by law and informed by experience." And we are forbidden to question the soundness of the reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

[File endorsement omitted.]

In United States District Court

Opinion on petition for rehearing

Filed June 20, 1935

VAN VALKENBURGH, Circuit Judge:

In support of the petition for rehearing counsel for petitioner urged the following criticisms of the order of the Secretary of Agriculture:

1. The Secretary employed an unreasonable, arbitrary, and 332 illegal method in finding total unit costs through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for rate-making purposes, in disregard of actual experience, basing rates upon hypothetical considerations and assumed conditions, contrary to the provisions of the Packers and Stockyards Act, which requires the public livestock market to be maintained as a competitive market.

2. It is necessary to consider the individual market agencies rather than to standardize all under a common mathematical rate base irrespective of such conditions as are essential to a competitive public market.

3. This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restriction of the agencies enabled to operate profitably.

4. The Secretary's order eliminates essential competitive costs.

5. With this elimination agencies cannot compete at a profit. This is shown by a comparison with the new costs as applied to actual business operations during the test period.

6. The Tagg case does not apply to the situation here.

In the Tagg case the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration. In this case the Secretary employed hypothetical costs based not upon present but upon assumed conditions which he expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees. I said:

"Basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure."

333 Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the Tagg case in the particulars pointed out by petitioner, as stated above. Furthermore, I think the drastic reduction of advertising and other costs essential to getting

and maintaining business gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken and ultimately to destroy this market by diverting business to other more favored markets and agencies and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market but equally to the shippers of stock who would most conveniently patronize it. I find myself in full agreement with Judge Wilkerson in the case of Acker vs. United States, recently decided in the District Court for the Northern District of Illinois. He says:

"I do not concur in the findings of This Court, which adopt in toto the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill."

I am therefore constrained to vote to deny this petition for rehearing in the hope that a renewed application to the Secretary may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it.

I fully concur in the foregoing Memorandum.

ALBERT L. REEVES,

United States District Judge.

[File endorsement omitted.]

334 In United States District Court for the Western District of Missouri, Western Division

In Equity. No. 2328 and Related Cases Nos. 2329-78

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL., PETITIONERS

vs.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

Opinion

Filed July 2, 1937

OTIS, District Judge, delivered the opinion of the Court:

The principal question now presented in these cases (the cases involve the validity of an order made by the Secretary of Agri-

culture fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards) is whether the Secretary, before he made the order which is attacked, gave the plaintiffs such a hearing as they were entitled to by law. That question is presented following a remand of the cases after an appeal. The cases, consolidated for trial, had been tried and were adjudged by this court (S. F. Supp. 766). The Supreme Court reversed our decree and remanded the cases for determination of the question "whether plaintiffs had a proper hearing." 298 U. S. 468. As an introduction to our discussion of the question we here incorporate the first and certain other paragraphs of the opinion of the Supreme Court.

"The proceeding" was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May, 1932. An Application for rehearing, in view of changed economic conditions, was granted in July 1932. After the taking of voluminous testimony, which was concluded in November 1932, the order of the question was made on June 14, 1933. Rehearing was refused July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The district court of three judges entered decrees sustaining the order and dismissing the bills of complaint. Motions for rehearing were denied and, by stipulation, the separate decrees were set aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal."

The Supreme Court then indicated in its opinion the question raised on the merits, after which the opinion continues:

"Before reaching these questions we meet at the threshold of the controversy plaintiff's additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, Sec. 317 U. S. C. 211):

SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that a rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

* That is, "the proceeding" which resulted in the Secretary's order fixing rates.

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case, or the maximum or minimum, to be charged, and what regulation or practice is or will be just, reasonable and non-discriminatory to be thereafter followed; * * *

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint, 336 * * *. The allegations in substance are: That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to acting secretaries the determination of issues with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as acting secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard or considered oral arguments relating thereto, or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the district court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

* * * * *

The outstanding allegation, which the district court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

337 The other allegations of the stricken paragraph do not go to the root of the matter. * * *

1. The essence then of the assertion of failure of the Secretary of Agriculture to give to plaintiffs that full hearing to which they were entitled is that the order under review was made by the Secretary

"without having heard or read any of the evidence and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted." That "outstanding allegation" now has been denied. Evidence has been heard. Not only has it not been proved that the Secretary did not read any of the evidence nor hear the oral arguments, nor read and consider the briefs which plaintiffs submitted, but exactly the opposite has been proved. The Secretary did read parts of the transcript of the testimony; he did hear (not with his ears but by reading) the oral arguments, he did read and consider the briefs submitted by plaintiffs. These things have been proved unless indeed we shall reject the testimony of the Secretary of Agriculture as incredible. That alternative, absent a much stronger showing than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the federal government.

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read all the evidence and in addition thereto, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act cannot be administered. It is entirely impracticable to administer it if it imposes such a duty on the Secretary personally. Consider that in this very case the transcript of the oral testimony fills 13,000 pages. The Exhibits, several hundred, fill more than 1,000 pages. A narrative statement of just a part of the oral testimony fills 500 printed pages. Learned counsel for plaintiffs assert indeed that they do not mean to contend that the Secretary personally must have read all of this mass of testimony. Such a contention could not be maintained. Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicted
 338 with some assurance that all this testimony will not be read by the justices of the Supreme Court when, as they must, they consider the cases on the merits.

It is the testimony of the Secretary of Agriculture that he heard the oral argument (by reading it) and that he read the briefs. It is his testimony that he gave consideration to the findings of fact (they were 180 in number and filled more than 100 printed pages). It is his testimony that he examined to some extent even the voluminous transcript of the oral testimony and the exhibits. He had besides the benefit of a discussion of the oral testimony and exhibits by trusted assistants who had read every line and examined each exhibit. That full hearing which the law required did not demand that he should do more. Evidence taken by an examiner, as the evidence here was taken, "may be sifted and analyzing of the evidence by his subordinates." So the Supreme Court has said. How can it be said that the Secretary did not have the benefit of and did not consider the results of a sifting and analyzing of evidence by competent subordinates?

It cannot well be argued to this Court that the findings of fact which were studied by the Secretary do not represent a sifting and analyzing of the evidence by his subordinates. This court has found that those findings not only are supported by some evidence, but also that they are supported by the weight of the evidence. Upon its own independent consideration of the evidence this court arrived at the same findings as those which were reached by subordinates of and by the Secretary. The Secretary, however, had much more than the findings. Other subordinates who had read all the testimony and examined all exhibits, discussed and reviewed the whole evidence with the Secretary.

The Supreme Court's meaning when it said that the evidence might be "sifted and analyzed by competent subordinates" for the Secretary is robbed of all practical significance and value when interpreted as by plaintiff's counsel, who say that evidence cannot be sifted and analyzed unless, as to any controverted issue, the testimony on both sides is set out either in full or in epitome. It seems to us that such an interpretation disregards the true and natural meaning of the words "sifted" and "analyzed." The very purpose of "sifting and analyzing evidence is to extract from it the pure gold of truth—the real and ultimate facts.

330 If, however, testimony is not "sifted" and "analyzed" unless as to any controverted issue the testimony for and against a given conclusion is presented, are plaintiffs in a position to contend that the Secretary did not have the benefit of a summary of the testimony most favorable to plaintiffs? Did not plaintiffs incorporate a summary of the testimony in oral arguments and briefs? The Secretary read a transcript of the oral arguments and he read the briefs. If in them counsel omitted to epitomize the testimony most favorable to their contentions can they challenge the fullness of the hearing on that account? A defendant even in a criminal case scarcely would be heard to challenge either the fairness or fullness of the hearing accorded him, let us say on a motion for a new trial, if he did not so much as direct the attention of the court to the evidence in his favor.

Findings of Fact

As to the issue made by the answer to Paragraph IV of the bill and upon the evidence heard we make the following findings of fact: We find that the Secretary of Agriculture caused to be sent to his private office for his use and consideration in connection with the performance of his function the full transcript of all the testimony taken in the proceeding, together with the exhibits; that he was advised by the Solicitor of the Department of Agriculture that his duty was a personal one and that the order must be his order based on his consideration of the record; that the Secretary personally read and considered a transcript of the whole of the oral argument before

⁷ Hon. Seth Thomas, now United States Circuit Judge in the Eighth Circuit, was then Solicitor of the department. His testimony especially is significant.

the Assistant Secretary and the briefs of the parties (in which oral arguments and briefs were such summaries of the evidence as the parties desired to incorporate therein); that, in addition to his study of oral arguments and briefs, the Secretary studied and considered findings made by competent subordinates in the Department of Agriculture resulting from a sifting and analyzing of all the evidence and that, further, he considered an oral review and discussion of all the evidence by other competent subordinates who personally had read every line of testimony and inspected each exhibit and that he supplemented all of the foregoing by himself reading and considering parts of the transcript of the oral testimony

Conclusion of Law

Based upon the findings of fact we conclude as a matter of law that the Secretary gave plaintiffs that hearing to which the law entitled them.

2. Obviously the only "further proceedings" in this court contemplated by the Supreme Court were such as would be necessary to determine the issue newly to be made following the handing down of the opinion of the Supreme Court. If, however, as is contended by learned counsel for plaintiffs, the cause really has been remanded not for "further proceedings" to "determine whether plaintiffs had a proper hearing" but for a rehearing, then, as to all issues, there has been accorded such a rehearing. We have reached the same conclusions on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

3. Exceptions are allowed to the conclusion of law newly stated here and also to those herein incorporated by reference.

Counsel for defendants will submit for approval and entry an appropriate form of decree dismissing the bills.

In United States District Court

Dissenting opinion

Filed July 2, 1937

VAN VALKENBURGH, Circuit Judge, dissenting:

I am unable to conclude from the testimony at this rehearing that the Secretary of Agriculture gave to the determination of this matter the personal consideration which is his duty under the provision of the Packers and Stockyards Act as construed by the Supreme Court. It is not an impersonal obligation. The proceeding has a quality resembling that of a judicial proceeding, in which the one who decides shall be bound to reach his conclusion "uninfluenced by

extraneous considerations which in other fields might have played a part in determining purely executive action." The proceeding is not one of ordinary administration, but looks to legislative action, in which the Secretary is the agent of Congress in the fixing of rates for market agencies. So that, as said by the Supreme Court

the authority conferred by the Act is not given to the Department of Agriculture, as a department in the administrative sense, but to the Secretary himself as the legislative agent of the Congress. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." *Morgan vs. United States*, 298 U. S. 468, 492.

There can be no doubt that, at the time of original trial in this court, it was the theory of the government, as expressed by its counsel, that the authority conferred by paragraph 310 of the Packers and Stockyards Act is given to the Department of Agriculture as a department in the administrative sense. This is apparent from the language of the motion to strike paragraph IV, among other parts of complainants' bill, "for the reason that the allegations contained in said portions of said petition are impertinent, redundant, incompetent, irrelevant, and immaterial to any issue which may properly be raised in this suit." This position was maintained on appeal before the Supreme Court, as appears from the argument of appellees reported in 298 U. S. at pages 469, 471. Counsel expressly referred to the language of this court to the effect "that the theory of these allegations is supported by nothing in the Act and that a construction of the Act inconsistent with that theory would destroy it altogether as a measure capable of practical administration." Counsel added in that presentation that to permit parties affected by "administrative decisions" thus to challenge orders, as signed upon insufficient deliberation, "might well lead to the paralysis of *administrative* tribunals." [Italics supplied.] Obviously no distinction was made between departmental proceedings in an administrative sense, and those of a quasi judicial character.

It is impossible, in my judgment, to read the testimony of the Secretary without recognizing that he carried into the final determination reached this conception of the proceeding as one belonging to his department in an administrative sense. The examinations he made were casual and perfunctory in the extreme. He says his final determination represented his reactions to the findings of the 342 men in the Bureau of Animal Industry. He accepted these findings because he regarded his subordinates as in a better position than himself to make the decision. In his view "the phrase 'Secretary of Agriculture' is perhaps used in connection with regard to laws of this sort in the broad sense as well as in the narrow sense."

While undoubtedly the Secretary may have such assistants to analyze and appraise evidence for his convenience and advice, this does not and should not mean that such appraisal may amount to final valuation, where the responsibility of decision is expressly addressed to the Secretary alone, sitting in a quasi judicial capacity. And this means a moral as well as a legal responsibility where large interests, as here, are critically affected.

The findings accepted by the Secretary emphasize the importance and necessity of this market. If it is to be maintained, those who conduct it must receive a fair and reasonable return upon their serv-

ices. This is true apart from a consideration of the question of confiscation as such. For this reason the conscientious judgment of the Secretary himself apart from his administrative character is demanded as a duty.

Of course the Secretary takes official responsibility when he signs any administrative order prepared by his department, but that is not the quality of responsibility demanded in a proceeding of this nature.

If it be true, as contended, that the Act cannot be administered except upon the superficial basis here disclosed, then legislation should be made to meet that situation. Necessarily I have made but brief reference to record contents in stating these conclusions. In my judgment the recitals of the Secretary as a whole confirm those views.

Being of opinion that the proceedings in this case differed in no substantial respect from those ordinarily involved in departmental administration, and that a serious condition in the life of this market has resulted from the purely casual and mechanical treatment it has received, I must respectfully dissent from the views expressed by my associates.

[File endorsement omitted.]

344

In the United States District Court

[Title omitted.]

In Equity. No. 2328 and Related Cases Nos. 2329-78

Opinion

Filed June 18, 1938

Before VAN VALKENBURGH, Circuit Judge, and REEVES and ORIS,
District Judges

PER CURIAM: The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1932, petitioner sought injunctive relief against enforcement of that order. This Court (July 22, 1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

“that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and

addresses of all persons upon whose behalf such amounts are collected by petitioner."

By agreement of counsel the temporary restraining orders, so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766.) Petitioners appealed. The Supreme Court, on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. 298 U. S. 468. After the remand and a presentation anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court, on April 25, 1938 (— U. S. —), reversed outright the decrees of this Court on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court, this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating \$586,093.32, paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners, the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners.

It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from who excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and as-

insurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges lawfully in effect then and thereafter has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed
348 "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall be thereafter observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order filed contemporaneously herewith. To that order defendants are allowed an exception.

ARBA S. VAN VALKENBURGH,
United States Circuit Judge.

ALBERT L. REEVES,
United States District Judge.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court June 18, 1938.

349 [Clerk's Certificate to foregoing transcript omitted in printing.]

350 In the Supreme Court of the United States
October Term, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION
COMPANY, ET AL., APPELLEES

On appeal from the District Court of the United States for the
Western District of Missouri

*Statement of points on which appellants intend to rely and of parts
of record necessary for consideration thereof*

Filed July 27, 1938

The appellants state that the points on which they intend to rely are the following:

1. The Court erred in denying defendants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said Court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the Court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 1, 1938, and such final order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction.

351 2. The Court erred in granting petitioners' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said Court on July 22, 1933, and extended from time to time thereafter.

3. The Court erred in holding that as a matter of law the funds now impounded in the custody of the Clerk belong to petitioners.

4. The Court erred in holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary, dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to petitioners.

5. The Court erred in holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. The Court erred in directing the distribution to petitioner of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the Court of the ultimate ownership of said moneys.

7. The Court erred in directing the distribution to petitioners of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by petitioners from their patrons.

8. The Court erred in failing to hold that the funds now impounded in the custody of the Clerk should be retained in the
352 custody of the said Clerk until such time as the Secretary of Agriculture, acting with due expedition, shall have made a final order, dated as of June 14, 1933, fixing the reasonable rates and charges to be charged by the petitioners for the period between July 24, 1933, and November 1, 1937.

9. The Court erred in failing to enter such order or orders with respect to the impounded funds as was and is consistent with right and justice and the laws of the United States.

The appellants state that the following parts of the record are necessary for the consideration of the aforesaid points, and therefore designate them as parts of the record to be printed by the Clerk of the Supreme Court of the United States:

1. Petition filed by F. O. Morgan, doing business as F. O. Morgan Sheep-Commission Company, in the United States District Court for the Western District of Missouri on July 19, 1933;

2. Defendants' answer to said petition, dated November 25, 1933;

3. Statement as to petitions filed in cases Nos. 2329 to 2378, inclusive;

4. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934;

5. Decree of the said District Court, dated December 20, 1934;

6. Petition for rehearing filed in the said District Court;

7. Order, dated January 2, 1935, granting leave to file petition for rehearing;

8. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing;

9. Stipulation, dated June 15, 1935, as to consolidation of causes;

10. Order, dated June 15, 1935, consolidating causes;

353 11. Mandate of the Supreme Court of the United States, dated May 25, 1936;

12. Supplemental answer of defendants, dated July 11, 1936;

13. Amended application of petitioners for leave to amend petitions, dated September 17, 1936;

14. Order, dated November 6, 1936, granting leave to amend petitions;

15. Defendants' answer, dated December 4, 1936, to petitions as amended;

16. Opinions of the said District Court, dated July 2, 1937;

17. Decree of the District Court dated July 9, 1937;

18. Temporary restraining order dated July 22, 1933;

19. Order dated September 19, 1933, continuing temporary restraining order;

20. Order dated June 20, 1935, denying petitions for rehearing and entering joint and final decree in cases as consolidated;

21. Order dated August 16, 1937, continuing temporary restraining order and staying operation of order of Secretary of Agriculture dated June 14, 1933, pending appeal to the Supreme Court of the United States from the said District Court's decree of July 9, 1937;

22. Mandate of the Supreme Court of the United States dated June 3, 1938;

23. Defendants' motion dated June 11, 1938, for an order staying further proceedings in the above-entitled cause and requesting the retention by the Clerk of the said District Court of moneys impounded in said Court pursuant to its interlocutory order of July

354 22, 1933, continued from time to time thereafter by further orders of the said Court, until such time as the Secretary proceeding with due expedition shall have entered a final order in

the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction;

24. Petitioners' reply to defendants' aforesaid motion;

25. Answer of New Amsterdam Casualty Company, substituted for Harry J. Kennaley, to defendants' aforesaid motion;

26. Petitioners' motion dated June 11, 1938, for the restitution of all impounded funds theretofore deposited by them with the Clerk of this Court between July 22, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by this Court on July 22, 1933, and extended from time to time thereafter;

27. Opinion entered in the said District Court on June 18, 1938, by Circuit Judge Arba S. Van Valkenburgh and District Judges Albert L. Reeves and Merrill E. Otis;

28. Final order and decree entered by said District Court on June 18, 1938;

29. Final decree of said District Court dated June 18, 1938, setting aside its former decree of July 9, 1937, and permanently enjoining the order of the Secretary of Agriculture dated June 14, 1933;

30. Defendants' petition for appeal to the Supreme Court of the United States;

31. Said District Court's order allowing appeal to the Supreme Court of the United States;

32. Defendants' assignment of errors filed with said petition for appeal;

33. Notice of appeal to Roy McKittrick, Attorney General of the State of Missouri;

34. Defendants' praecipe for record on appeal and acknowledgment of service thereon;

35. Citation and writ of service;

36. Any orders of this Court subsequent to the filing of the aforesaid mandate of the Supreme Court of the United States not herein enumerated.

N. A. TOWNSEND,
Acting Solicitor General.

This 16 day of July 1938.

The undersigned hereby acknowledge service of a copy of the foregoing statement of points to be relied on and parts of the record to be printed.

July 26, 1938.

FREDERICK H. WOOD,
JOHN B. GAGE,
Counsel for Appellees.

October Term, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,
APPELLANTS

vs.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION
COMPANY, ET AL., APPELLEES*Designation of parts of transcript of record to be printed, in addition
to parts designated by appellants*

Filed July 27, 1938

"Exhibit No. 24 offered by appellees in the administrative proceedings, being copy of 'Arbitrators' Award in Dockets 11, 12, 13, and 14.'"

Appellees object to the printing of the following portions of the transcript of record designated by appellants, and respectfully request that the cost of printing the same and the Clerk's costs be assessed against appellants for unnecessarily requiring them to be made part of the transcript of record and printed:

1. Opinions, findings of fact, and conclusions of law of the said District Court, dated October 29, 1934.
 2. Petition for rehearing filed in the said District Court.
 3. Order, dated January 2, 1935, granting leave to file petition for rehearing.
 4. Opinion of the said District Court, dated June 20, 1935, on petition for rehearing.
 5. Opinions of the said District Court, dated July 2, 1937.
- Dated July 27, 1938:

FREDERICK H. WOOD:

JOHN B. GAGE,

THOMAS T. COOKE

Attorneys for Appellees.

The undersigned hereby acknowledges service this 27 day of July, 1938, of a copy of the foregoing counter-designation and objections.

N. A. TOWNSEND,

Acting Solicitor General.

[Endorsement on cover:] File No. 42706. W. Missouri, D. C. U. S. Term No. 221. The United States of America and the Secretary of Agriculture, Appellants, vs. F. O. Morgan, Doing Business as F. O. Morgan Sheep Commission Company, et al. Filed July 25, 1938. Term No. 221 O. T. 1938.

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FILE

July 1, 1919

THE

F. O. M.

APPEAL

STATION

**In the District Court of the United States for
the Western District of Missouri, Western
Division**

In Equity No. 2328 and Related Cases Nos. 2329-78

**F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL., PETITIONERS**

v. •

**THE UNITED STATES OF AMERICA AND THE SECRE-
TARY OF AGRICULTURE, DEFENDANTS**

**STATEMENT OF DEFENDANTS, PURSUANT TO THE PRO-
VISIONS OF RULE 12 OF THE RULES OF THE SUPREME
COURT OF THE UNITED STATES, SHOWING THAT THE
SUPREME COURT HAS JURISDICTION TO REVIEW UPON
APPEAL THE FINAL DECREE AND ORDER OF THE DIS-
TRICT COURT DATED JUNE 18, 1938**

I

These appeals arise in connection with fifty in-
dividual suits (consolidated by stipulation of the
parties for the purpose of presentation, trial, and
other proceedings therein) which were brought by
market agencies doing business at the Kansas City
Stockyards (herein referred to as "petitioners")
to suspend, enjoin, set aside, and annul an order
dated June 14, 1933, made by the Secretary of

(1)

Agriculture in a proceeding entitled *Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Livestock Commission Company, et al.*, Bureau of Animal Industry, Docket No 311, instituted under the Packers and Stockyards Act, 1921 (7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159 *et seq.*).

Section 316 of the Packers and Stockyards Act (7 U. S. C., Section 217) provides:

For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168).

The applicable provisions of the laws relating to suits brought to suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals from orders or decrees made in such suits are found in Title 28, U. S. Code, Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220). Section 47 provides for a hearing by a three-judge court upon an application for an interlocutory injunction to sustain or restrain the

enforcement of orders of the Interstate Commerce Commission; and further provides:

* * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48. Section 47a provides in part as follows:

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

Section 238 of the Judicial Code as amended (28 U. S. C., Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act of 1921 (7 U. S. C., Section 217).

II

The constitutionality of the provisions of the Packers and Stockyards Act of 1921 is not involved.

III

The date of the final order and decree sought to be reviewed is June 18, 1938. The application for appeal was presented on 6-30, 1938.

IV

On June 14, 1933, the Secretary of Agriculture, acting under the applicable provision of the Packers and Stockyards Act of 1921, found that certain rates and charges theretofore filed with him by the petitioners herein as market agencies at the Kansas City Stockyards, at Kansas City, Missouri, were unjust and unreasonable and ordered that on and after July 24, 1933, certain specified rates and charges found by the Secretary to be just and reasonable should constitute the maximum rates and charges to be collected and charged by such marketing agencies for services rendered at said Kansas City stockyards in buying or selling livestock.

The petitioners instituted individual suits to suspend, enjoin, set aside, and annul the Secretary's order. A statutory three-judge court was assembled. On July 22, 1933, that court entered a temporary restraining order enjoining the enforcement of the Secretary's order and providing that

petitioners should deposit with the Clerk of the Court, "pending final disposition of this cause, the full amounts by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary." The temporary restraining order was extended from time to time thereafter, and the impounding continued until November 1, 1937, when a new schedule of rates, agreed upon by the Secretary of Agriculture and the market agencies, became effective. Approximately \$586,000 have been paid into the registry of the Court pursuant to the terms of the temporary restraining order. The question which the defendants seek to have reviewed by the Supreme Court relates immediately to the disposition of this money.

After a final hearing the petitions were dismissed by a decree entered by the District Court on June 15, 1935. An appeal was taken to the Supreme Court by the petitioners and on May 25, 1936, the decree of the District Court was reversed and the cause remanded for further proceedings in accordance with the opinion of the Supreme Court. *Morgan et al. v. United States et al.*, 298 U. S. 468.

The cause was reheard by a statutory three-judge court which, on July 9, 1937, entered a final decree again dismissing the petitions. A second appeal was taken to the Supreme Court. On April 25, 1938, the Supreme Court held that the hearing

given to the petitioners by the Secretary was "fatally defective," and that "the order of the Secretary was invalid" and reversed the decree of the District Court. *Morgan et al. v. United States et al.*, 58 Sup. Ct. 773. In its opinion the Supreme Court said, "We express no opinion upon the merits."

On May 20, 1938, defendants filed a petition for rehearing in the Supreme Court. In that petition defendants called the Supreme Court's attention to the fact that there had never been an adjudication as to the reasonableness of the maximum rates and charges which were fixed by the Secretary of Agriculture in his order of June 14, 1933, and that, pursuant to the temporary restraining order entered by the District Court on July 22, 1933, there was impounded in the registry of the District Court a large sum of money which represented the excess of the rates and charges collected by petitioners over and above the rates and charges found to be reasonable by the Secretary of Agriculture in his order of June 14, 1933. The Supreme Court was requested to indicate what disposition should be made of the said moneys impounded in the registry of the District Court. The petition for rehearing was denied on May 31, 1938, by a *per curiam* opinion in which the Supreme Court stated (82 L. ed. 1031-1032):

We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the

District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

On June 1, 1938, the Secretary of Agriculture made an order reopening the proceedings in the matter entitled *Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Livestock Commission Company et al., Market Agencies, doing business at the Kansas City stockyard, Kansas City, Missouri*. This order provided that the "Proceedings, Findings of Fact, Conclusion and Order," as issued by the Secretary of Agriculture on June 14, 1933, should be served upon petitioners as the tentative findings of fact, conclusion, and order of the Secretary, and that the petitioners should have thirty days to file exceptions to the said tentative findings of fact, conclusion, and order. It was further provided that petitioners should have opportunity to make all appropriate motions or objections with respect to further proceedings.

On June 11, 1938, defendants filed in the District Court a motion praying that all further proceedings in this matter be stayed and that the Clerk of said Court be directed to retain in his custody the impounded moneys until such time as the Sec-

retary should have entered a final order in the proceeding reopened by him pursuant to the order of June 1, 1938. On the same day petitioners filed with the District Court a motion praying that the Clerk of said Court be directed forthwith to restore to petitioners the impounded moneys. After a hearing on June 11, 1938, the District Court, on June 18, 1938, entered a decree enjoining, setting aside, and annulling the Secretary's order and filed a *per curiam* opinion overruling defendants' motion and sustaining petitioners' motion. In an order filed contemporaneously therewith and dated June 18, 1938, the District Court "ordered, adjudged, and decreed" that the impounded funds be distributed forthwith to petitioners. It is this order and decree which the defendants seek to have reviewed by the Supreme Court.

V

The grounds upon which it is contended that the questions involved upon this appeal are substantial are as follows: The excess charges now impounded in the registry of the Court, were collected only by virtue of the District Court's interlocutory stay issued on July 22, 1933, and thereafter from time to time renewed. Section 305 of the Packers and Stockyards Act expressly makes it unlawful for any market agency to collect rates which are unjust, unreasonable, or discriminatory. By his order of June 14, 1933, the Secretary found that the rates which petitioners had been collecting

were unjust, unreasonable, and discriminatory, and determined what were just and reasonable rates. The amount of the impounded moneys represents the amount by which the rates which petitioners have collected exceed the rates found by the Secretary to be just and reasonable. Until such time ^{as there} has been a determination by some court that the Secretary's finding that the existing rates were unjust, unreasonable, and discriminatory was not justified by the evidence before him, petitioners' patrons have a clear equity in the funds now impounded. The effect of the District Court's ruling, ordering immediate distribution to petitioners, is to cut off ^{off} the equity of their patrons without any adjudication as to whether or not petitioners in collecting rates which the Secretary has found to be unreasonable were acting legally within the terms of Section 305 of the Packers and Stockyards Act.

The final order and decree of the District Court herein effectively deprives the Secretary of Agriculture, because of an exclusively procedural error, of any opportunity to exercise the power, sought to be exercised in his order of June 14, 1933, to prescribe as ~~of~~ that date reasonable rates and charges for the services of petitioners at the Kansas City Stockyards. The effect of such final order and decree is to enable the petitioners to collect and to reduce to ownership charges whose reasonableness has been continuously in controversy since prior to June 14, 1933, without any

determination having been made that the charges are reasonable and without any opportunity having been afforded to obtain an authoritative determination as to their reasonableness. No decision of the Supreme Court of which defendants are aware has ever held that the substantive provisions of the Packers and Stockyards Act, or of any other similar regulatory statute, may thus be suspended by order of court and their enforcement ultimately defeated solely because of a failure to observe procedural safeguards established by law. No decision of the Supreme Court of which the defendants are aware, under the Packers and Stockyards Act or any other similar regulatory statute, warrants the conclusion of the District Court, which is implicit in its final order and decree, that the appropriate remedy for a failure to observe procedural safeguards established by law is an immunity from the substantive requirements of law rather than a right to have the requisite procedural safeguards observed. The final order and decree of the District Court herein is believed to be in direct opposition to Section 305 and other provisions of the Packers and Stockyards Act.

The Secretary of Agriculture, in reopening this proceeding by his order of June 1, 1938, has proceeded upon the theory that it is his duty under the Packers and Stockyards Act and under the decisions of the Supreme Court in this case to correct the procedural defect which invalidated the origi-

nal order and to make a proper determination as to whether the rates which petitioners have collected are the lawful and reasonable rates. The defendants submit that under the applicable provisions of the Packers and Stockyards Act the Secretary has the authority, in the circumstances of this case, to make an order in the reopened proceeding fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937. A contrary conclusion would necessarily mean that a mere procedural defect in an administrative proceeding, even though it has been corrected without prejudice to the rights of the parties, can foreclose and destroy substantive rights.

If there is any question as to whether or not the applicable statutes permit the Secretary to reopen this proceeding and make an order fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937, that question should be determined by the courts after the Secretary has acted and in a proceeding which properly presents the issue. The effect of the District Court's order restoring the moneys to petitioners is to adjudicate the questions of the rights of petitioners and petitioners' patrons in the impounded funds, and the authority of the Secretary of Agriculture to reopen the proceedings, in a suit in which those questions are not properly before the Court.

The defendants submit that the *per curiam* opinion of the District Court and the final order and decree entered thereon are inconsistent with the mandate of the Supreme Court under which the District Court's action was taken. In its memorandum opinion denying defendants' motion for rehearing, the Supreme Court stated that the questions as to the distribution of the impounded money "are appropriately for the District Court and they are not properly before us on the present record" and that:

What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

and remanded the case to the District Court "for further proceedings in conformity with our opinion." The District Court now takes the position that the interlocutory orders under which the impounded funds were accumulated must be interpreted as providing that the funds should belong to the petitioners in the event that the Secretary's order of June 14, 1933, should be held invalid. Those interlocutory orders were included in the record before the Supreme Court. If, as the District Court now holds, the terms of those orders necessarily require the conclusion that the impounded funds now belong to the petitioners, it

may be assumed that the Supreme Court would have so held and would have expressly stated that any further action by the Secretary would be irrelevant.

Even if it should be found that the District Court was correct in holding that the Secretary is without power to reopen this proceeding and make an order fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937, the order of the court directing distribution of the moneys to the petitioners without determination by the District Court as to the reasonableness of the rates under which the moneys were collected would be erroneous. The reasonableness of these charges has been continuously at issue in litigation. The action of the District Court in restoring the proceeds of the charges to the petitioners, without any opportunity having been afforded to obtain a determination as to their reasonableness, is in direct opposition to the command of Section 305 of the Packers and Stockyards Act, and permits the court's own processes to be utilized as a means of escape from the substantive obligations involved.

The prayer for reversal is deemed by the defendants to be justified under the decisions of the Supreme Court of the United States in *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Morgan et al. v. United States et al.*, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed.

1031, and other pertinent decisions of the Supreme Court of the United States.

VI

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *B. & O. R.R. Co. v. United States et al.*, 279 U. S. 781; *Atlantic Coast Line v. Florida*, 295 U. S. 301; and *Morgan et al. v. United States et al.*, 297 U. S. 468, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed. 1031.

Respectfully submitted.

↓ ROBERT H. JACKSON,
Solicitor General.

↓ THURMAN ARNOLD,
Assistant Attorney General.

↓ WENDELL BERGE,
Special Assistant to the Attorney General.

IN THE UNITED STATES DISTRICT
COURT

Before VAN VALKENBURGH, Circuit Judge, and
REEVES and OTIS, District Judges.

Opinion of the Court

Filed Oct. 29, 1934

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after final hearing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges for services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and

charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme (fol. 173) Court (*Tagg Bros. v. United States*, 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6,721 typewritten (fol. 174) pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an "Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3,091 typewritten pages in addition to which 111 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." There-

after, on June 14, 1933, the Secretary of Agriculture made and issued findings of facts and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock bought or sold, the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 1 to 20 head and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our (fol. 175) consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned, and the petitioners have made all of them save one. They are: (1) That the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that errone-

ous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros. v. United States, supra; Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, 454.

THE PROCEDURE

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." Sec. 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate (fol. 176) the obvious observation that the theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

FINDINGS SUPPORT ORDER

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that

these findings support the order. Unquestionably they do support the order and that fully.

FINDINGS SUPPORTED BY EVIDENCE

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City Stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the efficient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors (fol. 177) and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination, the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive, if the evidence before him was legally sufficient to

maintain them." *Tagg Bros. v. United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind, we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings. That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

CLAIMED ERRORS OF LAW

It is true that such an order as the one here attacked must be set aside if it rests upon an erroneous rule of law. *Tagg Bros. v. United States*,

280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following:

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was

error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not what they had cost) \$66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

CONFISCATION

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court, never has finally been decided by the Supreme Court. *Tagg Bros. v. United States*, 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company v. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679, 689; *Prendergast v. New York Tel. Co.*, 262 U. S. 43, 50; *Lehigh Valley R. Co. v. Board of Public Utility Com.*, 278 U. S. 24, 36; *United Railways & Electric Co. v. West*, 239 U. S. 234, 251; *Phillips v. Commissioner*, 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers

and Stockyards Act refers and by *United States v. Louisville and N. R. Co.*, 235 U. S. 314, 320; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 547, and the dissenting opinion in *Ohio Valley Water Works Co. v. Ben Avon Borough*, 253 U. S. 287, 297, as well as by the declaration of the Supreme Court to pass upon the matter in *Tagg Bros. v. United States*, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. *Darnell v. Edwards*, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for costs and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings,

then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital of petitioners, which is 6% on fixed capital and 7% on working capital, as a matter of law is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases. Only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are efficiently conducted, the issue of confiscation must be resolved against the petitioners.

OTHER MATTERS

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

FINDINGS OF FACT

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the Court at the trial of these cases, the Court adopts as its findings of fact the findings of fact made by the Secretary, and by reference incorporates them herein.

CONCLUSIONS OF LAW

The Court concludes as matters of Law:

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates

and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

INDICATED DECREE

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

IN THE UNITED STATES DISTRICT
COURT

Before VAN VALKENBURGH, Circuit Judge, and
REEVES and OTIS, District Judges

Concurring Opinion

Filed Oct. 29, 1934

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?
2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically conceded, the insistence being that the Secretary's allowance of costs is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer, in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for this purpose. Capable men cannot be picked up at will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring

and the services they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making of his market. This applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of record and briefs indicates that in various ways the agencies have striven to keep costs down. Obviously, it was to their interest to do so in years lean at the best. Their judgment as to their necessities should not be lightly set aside nor underestimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising, circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal trade territory. The market agencies have to compete with other stock markets, with cooperatives, a percentage of whose profits go back to their members, with packers, and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between

the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most valuable operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock-market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-

public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

My reaction to the presentation made is that I should have made a more liberal allowance for costs and owner return, not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and provided, further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as "a tribunal appointed by law and informed by experience." And we are forbidden to question the soundness of the

reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

IN THE UNITED STATES DISTRICT
COURT

Opinion ~~for~~^{on} Petition for Rehearing

Filed June 20, 1935

VAN VALKENBURGH, Circuit Judge: In support of the petition for rehearing counsel for petitioner urged the following criticisms of the order of the Secretary of Agriculture:

1. The Secretary employed an unreasonable arbitrary and illegal method in finding total unit costs through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for rate-making purposes, in disregard of actual experience, basing rates upon hypothetical considerations and assumed conditions, contrary to the provisions of the Packers and Stockyards Act, which requires the public livestock market to be maintained as a competitive market.

2. It is necessary to consider the individual market agencies rather than to standardize all under a common mathematical rate base, irrespective of such conditions as are essential to a competitive public market.

3. This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to

weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restrictions of the agencies enabled to operate profitably.

4. The Secretary's order eliminates essential competitive costs.

5. With this elimination agencies cannot compete at a profit. This is shown by a comparison with the new costs as applied to actual business operations during the test period.

6. The *Tagg* case does not apply to the situation here.

In the *Tagg* case the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration. In this case the Secretary employed hypothetical costs based not upon present but upon assumed conditions which he expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees. I said:

Basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure.

Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by petitioner as stated above. Furthermore, I think the drastic reduction of advertising and other costs, essential to getting and maintaining business, gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken, and ultimately to destroy, this market by diverting business to other more favored markets and agencies, and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market, but equally to the shippers of stock who would most conveniently patronize it. I find myself in full agreement with Judge Wilkerson in the case of *Acker v. United States*, recently decided in the District Court for the Northern District of Illinois. He says:

I do not concur in the findings of This Court which adopt in toto the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesman'ship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore,

in the entry of the decree dismissing the bill.

I am, therefore, constrained to vote to deny this petition for rehearing in the hope that a renewed application to the Secretary may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it.

I fully concur in the foregoing Memorandum.

ALBERT L. REEVES,
United States District Judge.

**In the District Court of the United States for
the Western District of Missouri, Western
Division**

In Equity No. 2328 and Related Cases Nos. 2329-78

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA AND THE SECRE-
TARY OF AGRICULTURE, DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and
REEVES and OTIS, District Judges

OTIS, District Judge, delivered the opinion of the
Court.

The principal question now presented in these cases (the cases involve the validity of an order made by the Secretary of Agriculture fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards) is whether the Secretary, before he made the order which is attacked, gave the plaintiffs such a hearing as they were entitled to by law. That question is presented following a remand of the cases after an appeal. The cases, consolidated

for trial, had been tried and were adjudged by this court (8 F. Supp. 766). The Supreme Court reversed our decree and remanded the cases for the determination of the question "whether plaintiffs had a proper hearing." 298 U. S. 468. As an introduction to our discussion of that question we here incorporate the first and certain other paragraphs of the opinion of the Supreme Court.

The proceeding¹ was instituted by an order of the Secretary of Agriculture in April 1930 directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May 1932. An Application for rehearing, in view of changed economic conditions, was granted in July 1932. After the taking of voluminous testimony, which was concluded in November 1932, the order in question was made on June 14, 1933. Rehearing was refused on July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The district court of three judges entered decrees sustaining the order and dismissing the bills of complaint. Motions for rehearing were denied and, by stipulation, the separate decrees were set

¹ That is, "the proceeding" which resulted in the Secretary's order fixing rates.

aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal.

The Supreme Court then indicated in its opinion the questions raised on the merits, after which the opinion continues:

Before reaching these questions we meet at the threshold of the controversy plaintiff's additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, Sec. 310; 7 U. S. C. 211):

"SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case, or the maximum or minimum, to be charged, and what regulation or practice is or will be just, reasonable,

and nondiscriminatory to be thereafter followed; * * *."

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint, * * *. The allegations in substance are:

That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to acting secretaries the determination of issues with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as acting secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard

or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the district court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

* * * * *

The outstanding allegation, which the district court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

The other allegations of the stricken paragraph do not go to the root of the matter. * * *

1. The essence then of the assertion of failure of the Secretary of Agriculture to give to plaintiffs that full hearing to which they were entitled is that the order under review was made by the Secretary "without having heard or read any of the evidence and without having heard the oral arguments or

having read or considered the briefs which the plaintiffs submitted." That "outstanding allegation" now has been denied. Evidence has been heard. Not only has it not been proved that the Secretary did not read any of the evidence nor *hear* the oral arguments, nor read and consider the briefs which plaintiffs submitted, but exactly the opposite has been proved. The Secretary did read parts of the transcript of the testimony; he did *hear* (not with his ears but by reading) the oral arguments; he did read and consider the briefs submitted by plaintiffs. These things have been proved unless indeed we shall reject the testimony of the Secretary of Agriculture as incredible. That alternative, absent a much stronger showing than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the federal government.

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read *all* the evidence and, *in addition thereto*, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act cannot be administered. It is entirely impracticable to administer it if it imposes such a duty on the Secretary personally. Consider that in this very case the transcript of the oral testimony fills 13,000 pages. The Exhibits, several hundred, fill more

than 1,000 pages. A narrative statement of just a part of the oral testimony fills 500 printed pages. Learned counsel for plaintiffs assert indeed that they do not mean to contend that the Secretary personally must have read all of this mass of testimony. Such a contention could not be maintained. Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicted with some assurance that all this testimony will not be read by the justices of the Supreme Court when, as they must, they consider the cases on the merits.

It is the testimony of the Secretary of Agriculture that he *heard* the oral argument (*by reading it*) and that he read the briefs. It is his testimony that he gave consideration to the findings of fact (they were 180 in number and filled more than 100 printed pages). It is his testimony that he examined to some extent even the voluminous transcript of the oral testimony and the exhibits. He had besides the benefit of a discussion of the oral testimony and exhibits by trusted assistants who had read every line and examined each exhibit. That full hearing which the law required did not demand that he should do more. Evidence taken by an examiner, as the evidence here was taken, "may be sifted and analyzing of the evidence by his subordinates." This court has found that those

findings not only are supported by some evidence, but also that they are supported by the weight of the evidence. Upon its own independent consideration of the evidence this court arrived at the same findings as those which were reached by subordinates of and by the Secretary. The Secretary, however, had much more than the findings. Other subordinates who had read all the testimony and examined all exhibits, discussed and reviewed the whole evidence with the Secretary.

The Supreme Court's meaning when it said that the evidence might be "sifted and analyzed by competent subordinates" for the Secretary is robbed of all practical significance and value when interpreted as by plaintiff's counsel, who say that evidence cannot be *sifted and analyzed* unless, as to any controverted issue, the testimony on both sides is set out either in full or in epitome. It seems to us that such an interpretation disregards the true and natural meaning of the words "sifted" and "analyzed." The very purpose of "*sifting and analyzing*" evidence is to extract from it the pure gold of truth—the real and ultimate facts.

If, however, testimony is not "sifted" and "analyzed" unless as to any controverted issue the testimony for and against a given conclusion is presented, are plaintiffs in a position to contend that the Secretary did not have the benefit of a summary of the testimony most favorable to plaintiffs? Did not plaintiffs incorporate a summary of

the testimony in oral arguments and briefs? The Secretary read a transcript of the oral arguments and he read the briefs. If in them counsel omitted to epitomize the testimony most favorable to their contentions can they challenge the fullness of the hearing on that account? A defendant even in a criminal case scarcely would be heard to challenge either the fairness or fullness of the hearing accorded him, let us say on a motion for a new trial, if he did not so much as direct the attention of the court to the evidence in his favor.

FINDINGS OF FACT

As to the issue made by the answer to Paragraph IV of the bill and upon the evidence heard we make the following findings of fact: We find that the Secretary of Agriculture caused to be sent to his private office for his use and consideration in connection with the performance of his function the full transcript of all the testimony taken in the proceeding, together with the exhibits; that he was advised by the Solicitor of the Department of Agriculture² that his duty was a personal one and that the order must be *his* order based on *his* consideration of the record; that the Secretary personally read and considered a transcript of the whole of the oral argument before the Assistant

² Hon. Seth Thomas, now United States Circuit Judge in the Eighth Circuit, was then Solicitor of the department. His testimony especially is significant.

Secretary and the briefs of the parties (in which oral arguments and briefs were such summaries of the evidence as the parties desired to incorporate therein); that, in addition to his study of oral arguments and briefs the Secretary studied and considered findings made by competent subordinates in the Department of Agriculture resulting from a sifting and analyzing of all the evidence; and that, further, he considered an oral review and discussion of all the evidence by other competent subordinates who personally had read every line of testimony and inspected each exhibit, and that he supplemented all of the foregoing by himself reading and considering parts of the transcript of the oral testimony.

CONCLUSION OF LAW

Based upon the findings of fact, we conclude as a matter of law that the Secretary gave plaintiffs that hearing to which the law entitled them.

2. Obviously the only "further proceedings" in this court contemplated by the Supreme Court were such as would be necessary to determine the issue newly to be made following the handing down of the opinion of the Supreme Court. If, however, as is contended by learned counsel for plaintiffs, the cause really has been remanded, not for "further proceedings" to "determine whether plaintiffs had a proper hearing" but for a rehearing, then, as to all issues, there has been accorded such a rehearing. We have reached the same conclusions on

the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

3. Exceptions are allowed to the conclusion of law newly stated here and also to those herein incorporated by reference.

Counsel for defendants will submit for approval and entry an appropriate form of decree dismissing the bills.

VAN VALKENBURGH, Circuit Judge, dissenting.

I am unable to conclude from the testimony at this rehearing that the Secretary of Agriculture gave to the determination of this matter the personal consideration which is his duty under the provisions of the Packers and Stockyards Act as construed by the Supreme Court. It is not an impersonal obligation. The proceeding has a quality resembling that of a judicial proceeding, in which the one who decides shall be bound to reach his conclusion "uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." The proceeding is not one of ordinary administration but looks to legislative action, in which the Secretary is the agent of Congress in the fixing of rates for market agencies. So that, as said by the Supreme Court, the authority conferred by the Act is not given to the Department of Agriculture, as a department in the administrative sense, but to the Secretary him-

self as the legislative agent of the Congress. That duty "undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." *Morgan vs. United States*, 298 U. S. 468, 482.

There can be no doubt that, at the time of original trial in this court, it was the theory of the government, as expressed by its counsel, that the authority conferred by paragraph 310 of the Packers and Stockyards Act is given to the Department of Agriculture as a department in the administrative sense. This is apparent from the language of the motion to strike paragraph IV, among other parts of complainants' bill, "for the reason that the allegations contained in said portions of said petition are impertinent, redundant, incompetent, irrelevant, and immaterial to any issue which may properly be raised in this suit." This position was maintained on appeal before the Supreme Court, as appears from the argument of appellees reported in 298 U. S. at pages 469, 471. Counsel expressly referred to the language of this court to the effect "that the theory of these allegations is supported by nothing in the Act and that a construction of the Act inconsistent with that theory would destroy it altogether as a measure capable of practical administration." Counsel added in that presentation that to permit parties affected by "administrative decisions" thus to challenge orders, as

signed upon insufficient deliberation, "might well lead to the paralysis of *administrative* tribunals."

[Italics supplied.] Obviously no distinction was made between departmental proceedings in an administrative sense, and those of a *quasi judicial* character.

It is impossible, in my judgment, to read the testimony of the Secretary without recognizing that he carried into the final determination reached this conception of the proceeding as one belonging to his department in an administrative sense. The examinations he made were casual and perfunctory in the extreme. He says his final determination represented his reactions to the findings of the men in the Bureau of Animal Industry. He accepted these findings because he regarded his subordinates as in a better position than himself to make the decision. In his view "the phrase 'Secretary of Agriculture' is perhaps used in connections with regard to laws of this sort in the broad sense as well as in the narrow sense."

While undoubtedly the Secretary may have such assistants to analyze and appraise evidence for his convenience and advice, this does not and should not mean that such appraisal may amount to final valuation, where the responsibility of decision is expressly addressed to the Secretary alone, sitting in a *quasi-judicial* capacity. And this means a moral as well as a legal responsibility, where large interests, as here, are critically affected.

The findings accepted by the Secretary emphasize the importance and necessity of this market. If it is to be maintained, those who conduct it must receive a fair and reasonable return upon their services. This is true apart from a consideration of the question of confiscation as such. For this reason the conscientious judgment of the Secretary himself apart from his administrative character is demanded as a duty.

Of course the Secretary takes official responsibility when he signs any administrative order prepared by his department, but that is not the quality of responsibility demanded in a proceeding of this nature.

If it be true, as contended, that the Act cannot be administered except upon the superficial basis here disclosed, then legislation should be made to meet that situation. Necessarily I have made but brief reference to record contents in stating these conclusions. In my judgment the recitals of the Secretary as a whole confirm these views.

Being of opinion that the proceedings in this case differed in no substantial respect from those ordinarily involved in departmental administration, and that a serious condition in the life of this market has resulted from the purely casual and mechanical treatment it has received, I must respectfully dissent from the views expressed by my associates.

**In the District Court of the United States
for the Western District of Missouri,
Western Division**

In Equity No. 2328 and Related Cases Nos. 2329-78

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA AND THE SECRE-
TARY OF AGRICULTURE, DEFENDANTS

Before VAN VALKENBURGH, Circuit Judge, and
REEVES and OTIS, District Judges

PER CURIAM: The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1933, petitioners sought injunctive relief against enforcement of that order. This Court (July 22,

1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

By agreement of counsel the temporary restraining orders so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766.) Petitioners appealed. The Supreme Court on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. ²⁹²U. S. 468. After the remand and a presentation ²⁹⁸anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court on April 25, 1938 (— U. S.

—), reversed outright the decrees of this Court, on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating \$586,093.32 paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter, after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners, the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has en-

joined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to pre-

scribe shall be determined and prescribed "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall "be *thereafter* observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order filed contemporaneously herewith. To that order defendants are allowed an exception.

United States Circuit Judge.

United States District Judge.

United States District Judge.

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No. 221

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA AND THE SECRETARY
OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OF THE UNITED STATES AND THE SECRETARY OF
AGRICULTURE IN OPPOSITION TO THE APPELLEES' MO-
TION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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TION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

STATEMENT

This appeal arises in connection with fifty in-
dividual suits (consolidated by stipulation of the
parties for the purpose of trial and other proceed-
ings) which were brought in the United States Dis-
trict Court for the Western District of Missouri,
to suspend, enjoin, set aside, and annul an order
dated June 14, 1933, made by the Secretary of Agri-

culture in a proceeding entitled *Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrew's Live Stock Commission Company, et al.*, Bureau of Animal Industry, Docket No. 311, instituted under the Packers and Stockyards Act, 1921 (7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159, *et seq.*).

The final order and decree from which the appellants have appealed was entered by the district court on June 18, 1938.¹ An order allowing appeal was entered by the district court on June 30, 1938, and the case was docketed in this Court on July 25, 1938. The history of this litigation is briefly summarized in the statement of jurisdiction which the appellants have hitherto filed pursuant to Rule 12, paragraph 1 of the rules of this Court.

The order and decree from which appellants have appealed directs the clerk of the district court to distribute to the appellees approximately \$580,000 which have been impounded in the registry of the court pursuant to the terms of a temporary restraining order which the court entered on July 22, 1933. The funds so impounded represent the excess of the rates and charges collected by petitioners between July 24, 1933, and November 1, 1937, over and above the rates and charges found to be reasonable by the Secretary of Agriculture in the order which he made on June 14, 1933. The

¹ Because the record on appeal has not yet been printed, it has been impossible to insert the appropriate record references.

impounding ceased on November 1, 1937, because on that date a new schedule of rates agreed upon by the Secretary of Agriculture and the market agencies became effective. The pertinent provisions of the impounding order follow (R. 128):²

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

On the same date that the district court entered the order and decree from which appellants have appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement. In that decree, however, the district court retained jurisdiction so that—

such other proceedings [may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs

² This record reference is to *F. O. Morgan et al. v. United States and the Secretary of Agriculture*, No. 581, October Term, 1937.

in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933, as to law and justice may appertain. * * *

This decree properly left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

The appellees have filed a statement in opposition to the jurisdiction of this Court and a motion to dismiss or, in the alternative, to affirm the final order and decree of the district court. This brief is submitted in opposition to that motion pursuant to the provisions of paragraph 3 of Rule 7 of the rules of this Court.

I

THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE FINAL DECREE AND ORDER ENTERED BY THE DISTRICT COURT ON JUNE 18, 1938, IS APPEALABLE AS A MATTER OF RIGHT

Section 316 of the Packers and Stockyards Act (7 U. S. C., Sec. 217) provides:

For the purposes of sections 201 to 217, inclusive, of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Com-

merce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter. (Aug. 15, 1921, c. 64, § 316, 42 Stat. 168.)

The laws relating to suits brought to restrain enforcement of orders of the Interstate Commerce Commission are found in Title 28 U. S. Code, Sections 44, 47, and 47a (Act of October 22, 1913, c. 32, 38 Stat. 219). Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin or set aside any order of the Interstate Commerce Commission shall be governed by the provisions of Sections 47 and 47a. Section 47 provides for the convening of a three-judge court upon application for an interlocutory injunction against an order of the Interstate Commerce Commission, and further provides that—

* * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 47a, relating to expedition and appeal, provides in part as follows:

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the

Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

Section 238 of the Judicial Code, as amended (Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 936; 28 U. S. C., Sec. 345) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act (7 U. S. C., Sec. 217).

A. THE FINAL ORDER AND DECREE OF THE DISTRICT COURT IS APPEALABLE BECAUSE IT IS BASED UPON AN ERRONEOUS CONSTRUCTION AND APPLICATION OF THE MANDATE OF THIS COURT

After this Court handed down an opinion on April 25, 1938, holding that the Secretary's order was invalid, the appellants filed a petition for rehearing in which they called this Court's attention to the existence of the impounded funds, suggested that upon remand the appellees would doubtless contend that the funds belonged to them, and on that basis, among others, sought to have this Court rehear the case. In opposition to this petition appellees asserted that because the Secretary's order had been held to be invalid the release of the impounded funds followed as a matter of course and that no specific directions from this Court in respect thereto were required. In disposing of

these conflicting claims this Court used the following language (82 L. ed. 1031):

The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

This Court thereupon remanded the case for further proceedings in conformity with its opinion. Appellants contend that the mandate, when read in the light of this Court's opinion, did not authorize the district court to distribute the impounded funds to the appellees without giving the Secretary of Agriculture a reasonable opportunity to correct his procedural mistake and to make a determination as to the reasonableness of the excess charges col-

lected by appellees. The appellees on the other hand assert that the order and decree of the district court was not only consistent with the mandate, but indeed was required by its terms.

The district court's order and decree raises an immediate issue as to the construction and application of the mandate of this Court. It is well settled that such an order and decree is appealable under the statutory provisions applicable to this case. *Baltimore and Ohio R. Co. v. United States*, 279 U. S. 781, 785; *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 142; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255; *Cf. In re City of Louisville, Kentucky*, 231 U. S. 639.

In *Baltimore and Ohio R. Co. v. United States*, 279 U. S. 781, the Interstate Commerce Commission had ordered certain so-called east-side railroads (operated from the east into St. Louis, Missouri) to absorb transfer charges on certain freight, the transfer charges having previously been borne by certain so-called west-side railroads (operating from the west into St. Louis). The east-side roads brought a suit in the District Court for the Northern District of Illinois to set aside the Commission's order. A three-judge district court, convened under the applicable statutory provisions, dismissed the bill of complaint. The Supreme Court reversed the district court's decree and remanded the case for further proceedings in conformity with its opinion and decree (277 U. S. 8).

291). The east-side roads thereupon applied to the district court for a decree requiring the west-side roads to pay to them the transfer charges which the east-side roads had been compelled to absorb by the Commission's order. The district court denied the application and the east-side roads appealed. The appellees filed a motion to dismiss on the same ground urged in the present case, i. e., the order of the district court was not reviewable by the Supreme Court on appeal. The Supreme Court held that the decree of the district court was appealable on the ground, among others, that the appeal raised a question as to the construction and effect to be given to the mandate. The Court said (279 U. S. 785):

When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. *In re Potts*, 166 U. S. 263, 265. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255, and cases cited. It is well understood that this Court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.

The appellants submit that since the question raised by this appeal is whether the lower court misconstrued and refused to give effect to the mandate of this Court, the decision in *Baltimore and Ohio R. Co. v. United States*, 279 U. S. 781, conclusively establishes the right to maintain the appeal;

and if that misconstruction is to be corrected, it must be corrected on this appeal, because the order directing the payment of the impounded funds to the appellees is final and definitive so far as the instant proceedings in the court below are concerned.

B. THE ORDER AND DECREE OF THE DISTRICT COURT IS ALSO APPEALABLE BECAUSE IT WAS ENTERED IN A PROCEEDING WHICH "IS INCIDENTAL TO AND IN EFFECT A PART OF THE MAIN SUIT"

In *Baltimore and Ohio R. Co. v. United States*, 279 U. S. 781, this Court held that the order there involved was appealable on still another ground in addition to the one which has been discussed above. The Court said (p. 785):

Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States*, *supra*, 424. *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first. *Arkadelphia Co. v. St. Louis S. W. Ry.*, 249 U. S. 134, 142.

Quite apart from the controversy as to the proper construction of this Court's mandate, the final

order and decree of the district court is appealable because it, like the decree in the *Baltimore and Ohio* case, was entered in a proceeding incidental to and in effect a part of the main suit. Furthermore, it is an order which purports "to enforce the rights and obligations of the parties" that have arisen in this litigation. It makes no difference for this purpose whether the right which the appellees assert, and which the order seeks to protect, is one which arises "automatically," as appellees contend, or is one which was created by the order. Whatever may have been the ultimate origin of the asserted right, it was first given content and form by the order to which appellants now object. Until the district court had acted the right was inchoate. The appellees themselves tacitly recognized this fact by filing a motion asking the district court to direct the distribution of the impounded funds. Such an order which thus seeks to enforce a right which is asserted to have arisen in the course of the litigation, and which is made in a proceeding "incidental to and in effect a part of the main suit" is clearly appealable under the decision of this Court in *Baltimore and Ohio R. Co. v. United States*, 279 U. S. 781.

There is no merit in the appellees' suggestion that the order and decree may be regarded as an exercise of the discretion of the district court or that the only possible ground for attacking the order is that its entry was an abuse of that discretion.

On the contrary the appellants contend that as a matter of law the district court had no right to order the distribution of the impounded funds to appellees without giving the Secretary of Agriculture a reasonable opportunity to correct his procedural mistake and to make a determination as to the reasonableness of the rates which the appellees collected. It is not abuse of discretion to which appellants object but the disregard of the statutory purpose and the abandonment of the equitable principles which should have controlled the action of the court below.

II

THE APPELLEES' MOTION TO AFFIRM THE DECREE OF THE DISTRICT COURT SHOULD BE DENIED

By their motion, appellees seek to have this Court determine the merits of the appeal without the benefit of a full discussion of the difficult and important questions of law involved. The appellees make this request not only despite the fact that a large amount of money is involved, but also despite the fact that the appeal raises important and far reaching questions in the field of administrative law—questions which are so novel that appellees have been unable to cite a single *ad hoc* decision in support of their contention that the appeal is frivolous.

A. THE APPEAL PRESENTS SUBSTANTIAL AND IMPORTANT
QUESTIONS OF LAW

This appeal is occasioned by the action of the district court in directing the distribution of the impounded funds to the appellees before the Secretary of Agriculture has had an opportunity to make a determination as to the reasonableness of the excess charges which the impounded funds represent and before the legality and propriety of that determination has been adjudicated by the courts. The appellants contend that this action by the district court was erroneous as a matter of law. It is inconsistent with the purpose of the order under which the funds were impounded and it disregards all of the equitable principles which should have controlled the action of the court.

The terms of the order under which the impounded funds were collected require that the funds be held "pending final disposition of the cause." There is nothing in the terms of the order which requires that the final disposition of the case be made before the substantive rights of the parties have been determined. Neither the mandate of this Court nor the principles of equity jurisdiction require the granting of final relief to the appellees in disregard of the substantive rights of the litigants. Certainly the appellants in consenting to the form of the temporary restraining order contemplated the final disposition of the case on its merits and not upon a mere matter of procedure.

In view of this Court's opinion on rehearing, reserving decision as to "further proceedings" of the Secretary, it is plain that there has been no final disposition of the cause merely because of the entry of a permanent injunction the decree for which reserved jurisdiction so that "other proceedings" might be had as to the distribution of impounded funds.

o The argument of the appellees that their right to the impounded funds was determined by the opinion and mandate of this Court is not entitled to serious consideration. The appellees so argued in opposition to the appellants' motion for rehearing last term. This Court expressly rejected that argument in its memorandum opinion denying the application for rehearing, which stated that the record at that time did not raise that question.

Appellees' further argument that they at all times had title to the impounded funds is equally fallacious. An examination of the provisions of the impounding order which are quoted on page 3, *supra*, will disclose that, in addition to depositing the excess charges in court, the appellees were required to file verified statements of the names and addresses "of all persons upon whose behalf such amounts were collected." The persons upon whose behalf the excess charges were collected were the shippers who had been compelled to pay a rate found by the Secretary to be unreasonable. To argue that the terms of the impounding order compel payment of the excess charges to appellees when

there has been no final adjudication on the merits of their right to collect those charges in the first instance is to ignore the plain purpose of the order. The terms of the order certainly do not require, as a matter of law, that the impounded funds be paid out to the appellees before the Secretary of Agriculture has had an opportunity to correct the procedural mistake which made his original order unenforceable and to make a determination as to the reasonableness of the excess charges which appellees collected.

The flagrantly unjust result for which appellees contend—that the shippers should be without effective remedy because the Secretary made a procedural error—was certainly not intended by Congress. The primary purpose of the Packers and Stockyards Act was to protect persons who use the facilities of stockyards against the exaction of unreasonable rates and charges (Sec. 305). It is pursuant to this purpose that Section 310 of the statute authorizes the Secretary of Agriculture to issue orders fixing reasonable rates and charges. The statute does provide that such orders can be made only after “full hearing.” But the procedural safeguard can be fully enforced without conferring immunity upon the market agencies or depriving the farmers of the substantive benefits of reasonable rates guaranteed by the Act.

Even if Section 310 of the Act stood alone, it could not fairly be contended that a procedural mistake in the issuance of an order under that section was

intended to conclude the substantive rights of persons not responsible for the mistake. Section 305 of the Act, however, underscores the dominant purpose of the Act. That section, in terms, confers upon appellees' patrons, the shippers, a substantive right, which is independent of the procedural validity of any order issued by the Secretary, that all rates or charges made by petitioners for their services shall be just and reasonable. Section 305 provides:

All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

This section and Section 307, dealing with unreasonable or discriminatory practices, are the basic provisions of the Act. Examination of the statute as a whole will show that the other provisions, including Section 310, are merely the complementary means adopted by Congress for making effective the primary obligations declared in Sections 305 and 307. The right extended the shippers not to be compelled to pay charges in excess of what is just and reasonable is illusory if it can be irretrievably defeated by a procedural error.

The appellants contend that in the circumstances of this case the Secretary has the power to correct his procedural mistake. The effect of Sections 305

and 310 taken together is to confer upon the Secretary as a necessary incident of his general rate-making authority, the power to correct procedural mistakes and, in the circumstances of this case, to make a determination, after observing all procedural safeguards, as to the reasonableness of the rates collected by the appellees. Any other construction of the statute would permit a procedural mistake, not jurisdictional in character, to foreclose and destroy substantive rights.

If, as here, a litigant has not received a full hearing, as the statute requires, he is entitled to that hearing; he is not entitled to immunity from regulation because of a deviation from proper procedural safeguards when the deviation is not jurisdictional in character and can be corrected without substantial injustice.

There is nothing in the statute which precludes the protection of the farmers by the entry of an order to be given effect *nunc pro tunc*. Appellees ignore completely the well-established distinction between an error and want of jurisdiction. That the Secretary had jurisdiction over the original proceedings which culminated in the entry of the order in dispute, there can be no question. The original proceedings may have been so defective as to enable the appellees to impeach the order by direct attack in the courts. But it can scarcely be urged that the appellees without resorting to the courts could have ignored the order and have refused to comply with it. (Compare *Atlantic Coast*

Line. v. Florida, 295 U. S. 301, 311.) This Court itself has compared the proceedings before the Secretary to a proceeding in an equity cause before a special master or trial judge where the special master or trial judge accepts the findings prepared by counsel for one of the parties without giving the other party an opportunity to know their contents and present objections. The decree of the trial judge in such an equity proceeding might be voidable, but certainly it could not be ignored or treated as a complete nullity. The impeachment of the original decree would not destroy the jurisdiction of the court, but the cause would be remanded for the correction of the error, and the rights of the parties would not be prejudiced by the running of the statute of limitation or any other circumstances which did not affect the substantial equities of the parties as they existed at the commencement of the suit. There is no reason for applying other or different rules to an administrative proceeding. Adoption of the view here urged would be in harmony with the remedial scheme of the statute, and would have the practical advantage for all parties of permitting the original record to stand—to be supplemented only as the requirements of a full hearing may demand.³ Above all, such a construction would establish the principle that—save where

³ Contrary to appellees' contention, we see nothing that should prevent the Secretary from permitting the introduction of new evidence which may be shown to be material, relevant, and competent.

Congress has otherwise expressly provided—enforcement of statutory requirements of a fair hearing is not to have the self-defeating consequence of taking away, without a hearing, substantive rights conferred by the statute.

The fact that the statute does not in detailed language describe the action which the Secretary now proposes to take is of no moment. In the Packers and Stockyards Act Congress provided only a general framework for administrative procedure and judicial review. The details were left to be articulated by the Secretary and the courts. Congress, of course, intended that the process of articulation should produce a system which insured both orderly procedure and substantive justice. It did not intend that the power of the Secretary as the rate-making agency, or the rights of the shippers whom the Act was intended to protect, should be foreclosed and destroyed by a mere procedural mistake.

This Court has often refused to permit mistakes in administrative procedure to destroy substantive rights or to foreclose equities which deserve protection. *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Mahler v. Eby*, 264 U. S. 32; *Ted v. Waldman*, 266 U. S. 113. There is nothing in the Packers and Stockyards Act to warrant a construction which needlessly would magnify procedural errors into an occasion for the immolation of the basic purposes of the Act.

The appellees insist that if the Secretary now makes a determination as to the reasonableness of the excess charges collected by market agencies, that determination must necessarily be regarded as a retroactive rate order. This objection misconceives the character of the determination which the Secretary proposes to make. The Secretary has already reopened the original proceeding, by his order of June 2, 1938. This Court has held that there was a procedural error in the previous administrative hearing. When this error has been corrected in accordance with the opinions of this Court, the Secretary's order will be in fulfillment of its original purpose—to prescribe rates for the future. The effect of that order will be properly and justly to determine the disposition of the impounded funds. It is no more retrospective in its substantive effect than the order of the district court disposing of the funds would have been if the original order had not been subject to procedural error. The policy of Congress in this regard was not that the Secretary should never in any circumstances make orders having retrospective consequences, for reparation proceedings (Sec. 308, 309) are for this very purpose, but that money liability for past conduct should in the ordinary case be established by proceedings initiated by private parties. In the special circumstances of this case, the order of the Secretary will not create a money liability for past conduct but will in practical effect determine rights to money in escrow, thus justly determining the

proper distribution of a fund which was created for the purpose of enabling a decision on the merits to be made without prejudice to the rights of either litigant. The Act in no way prevents this common-sense construction, and the corrected order obviously will not be retroactive in the sense of disturbing executed transactions or vested rights contrary to the intention of Congress. After the Secretary in June 1933, having jurisdiction of the parties and subject matter and acting under color of the statute, made his order, the parties were fully aware that their rights after that date were to be determined in the light of the statute and the Secretary's order.

The appellees insist that what the Secretary proposes to do is to award reparation to shippers for the period between July 22, 1933, and November 1, 1937. But, as it has been explained above, this is not what the Secretary proposes to do and all of appellees' comments with respect to the power of the Secretary to award reparation are therefore beside the point.

Appellees also assert that the rates which they have collected were *lawful* as opposed to merely *legal* rates and are therefore immune from attack. But the Secretary intends to exert his general rate-making power and not his power to award reparation; and the distinction between lawful and legal rates imposes no limitation on the rate-making power. And, in any event, rates which appellees collected were not *lawful* as distinguished from *legal* rates. See *Arizona Grocery Co. v. Atchison*,

etc., Ry. Co., 284 U. S. 370. They were not, as appellees assert, lower than effective maximum rates duly established by the Secretary after a full administrative hearing. The maximum rates to which appellees refer were rates which resulted from an arbitration proceeding. They were not established by order of the Secretary; he merely acquiesced in their filing in the same way he might acquiesce in any other schedule of rates voluntarily filed by appellees.

B. THE SUGGESTION THAT THE APPEAL WAS TAKEN FOR PURPOSES OF DELAY IS UNWARRANTED

The appellees also move to affirm the order of the district court on the ground "that it is manifest that the appeal was taken for delay only." Nothing in the record affords a shred of support for appellees' assertion that the appellants are in any way seeking to delay the final adjudication of this controversy. At all times since May 31, 1938, when this Court denied the petition for a rehearing of the prior appeal in this cause (58 S. Ct. 773; 84 L. ed. 1031), the appellants have made every effort to obtain a speedy adjudication of this controversy. On June 2, 1938, the Secretary of Agriculture issued a signed order reopening the administrative proceeding, serving tentative findings of fact and conclusion, and order upon the appellees, and giving them thirty days in which to file exceptions thereto. On June 11, 1938, the appellants filed a motion in the district court seeking to stay the distribution

of the impounded funds until such time as the Secretary should make an order in the reopened administrative proceeding and the merits of that order should have been finally adjudicated. On June 18, 1938, the district court denied the appellants' motion and entered a final order and decree directing that the impounded funds be distributed to appellees. An appeal from that final order and decree was perfected on June 30, 1938, and the case was docketed in this Court on July 25, 1938.

CONCLUSION

The appellees' motion to dismiss or in the alternative to affirm should be denied.

Respectfully submitted.

✓ WARNER W. GARDNER,

Acting Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR A STAY AND SUPERSEDEAS PENDING APPEAL

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri is unreported.¹

¹ Because the record on appeal has not yet been printed, it has been impossible to insert the appropriate record references.

JURISDICTION

The final order and decree of the District Court was entered on June 18, 1938. Appellants have filed a statement of jurisdiction pursuant to Rule 12, paragraph 1, of the rules of this Court.

STATEMENT

This appeal arises in connection with fifty individual suits (consolidated by stipulation of the parties for the purpose of trial and other proceedings) which were brought in the United States District Court for the Western District of Missouri to suspend, enjoin, set aside, and annul an order made by the Secretary of Agriculture on June 14, 1933, prescribing maximum rates to be charged by market agencies at the Kansas City stock yards. The order was made by the Secretary in a proceeding entitled *Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Live Stock Commission Company, et al.*, Bureau of Animal Industry, Docket No. 311, instituted under the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159 *et seq.*, 7 U. S. C., c. 9, Sections 181-229).

The District Court sustained the order of the Secretary and entered a decree of dismissal, but on April 25, 1938, this Court rendered an opinion reversing the decree of the District Court (58 Sup. Ct. 773). The Court found that the order was procedurally defective but expressly refrained from passing any judgment upon its merits.

The United States and the Secretary of Agriculture (the appellants here) requested a rehearing on the ground (among others) that important questions as to the distribution of moneys impounded in the custody of the District Court remained undetermined. The appellants contended that the procedural irregularity did not require or justify the distribution of the impounded funds before there had been a determination of the rights of the parties on the merits. (Petition for Rehearing, pp. 9-15, and Memorandum in Reply to Memorandum in Opposition to Petition for Rehearing, pp. 4-12.)

The market agencies (the appellees here) in opposing a rehearing asserted that this Court by its decision on April 25, 1938, had held, and held correctly, that the impounded funds belonged to the appellees and should forthwith be released to them. But in denying a rehearing, this Court carefully pointed out that it had not so decided; stating (58 Sup. Ct. 999, 1001):

The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid

because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

On June 2, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the controverted order of June 14, 1933, was entered, with a view to correcting the procedural irregularity and determining whether or to what extent the order of June 14, 1933, might be validated, after according to the appellees every right to which this Court had held them to be entitled.

Whereupon, the appellants—the United States and the Secretary of Agriculture—on June 11, 1938, made a motion in the District Court to have all further proceedings stayed and the Clerk of the District Court directed to retain the funds impounded until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. The District Court denied the motion and on June 18, 1938, entered an order directing that the funds be distributed to appellees. It is this order from which the present appeal is taken.

The funds in question, amounting to approximately \$580,000, were impounded in the registry

of the District Court pursuant to the terms of a temporary restraining order which the court entered on July 22, 1933. The funds so impounded represent the excess of the rates and charges collected by petitioners between July 24, 1933, and November 1, 1937, over and above the rates and charges found to be reasonable by the Secretary of Agriculture in the order which he made on June 14, 1933. The impounding ceased on November 1, 1937, because on that date a new schedule of rates agreed upon by the Secretary of Agriculture and the market agencies became effective. The pertinent provisions of the impounding order follow (R. 128):²

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

On the same date that the District Court entered the order and decree from which appellants have

² This record reference is to *F. O. Morgan et al. v. United States and the Secretary of Agriculture*, No. 581, October Term, 1937.

appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement. In that decree, however, the District Court retained jurisdiction so that—

such other proceedings-[may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933, as to law and justice may appertain. * * *

This decree properly left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

An order allowing appeal from the order of June 18, 1938, was entered by the District Court on June 30, 1938. On the same day, however, the District Court denied appellants' motion for an order staying the enforcement of the order of June 18, 1938, pending the appeal to this Court.

Appellants thereupon applied to Mr. Justice Butler for an order staying and superseding the District Court's order of June 18, 1938, pending appeal. By order entered July 15, 1938, Mr. Justice Butler has referred this application to the Court, and pending a decision by the Court on the application, has stayed and superseded the order of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In denying appellants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 2, 1938, and such final order shall have become of competent jurisdiction.

2. In granting appellees' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said court between July 24, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said court on July 22, 1933, and extended from time to time thereafter.

3. In holding that as a matter of law the funds now impounded in the custody of the Clerk belong to appellees.

4. In holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to appellees.

5. In holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. In directing the distribution to appellees of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the court of the ultimate ownership of said moneys.

7. In directing the distribution to appellees of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by appellees from their patrons.

ARGUMENT

We have shown in the brief in opposition to the motion to dismiss or affirm that the order here involved is appealable as a matter of right. It is so appealable not only because it was entered upon a misconstruction of the mandate of this Court but also because it is an order incidental to the main suit and final in form and effect. Since the order is appealable and since, consequently, the motion to dismiss should be denied, it follows as of course that a stay pending disposition of the appeal should be granted.

The District Court has ordered distribution of the impounded funds to appellees without according the Secretary of Agriculture the reasonable opportunity he requested to correct his procedural error and to validate his order so far as the facts and the law may justify. The precise question to be decided on this appeal is whether the District Court erred in ordering such distribution. Manifestly, if pending this Court's decision of this question the funds are distributed, the Court in determining whether the order of distribution was erroneous would be deciding an abstract question. If this Court denies a stay and later holds the District Court's order was erroneous, the reversal would be wholly bootless; the erroneous order, carried into effect by the denial of the stay, would be reversed to no avail. Thus it is essential to the preservation of this Court's appellate jurisdiction that the stay be granted; for although technically, perhaps, the immediate distribution of the impounded funds might not destroy the Court's jurisdiction, it would quite effectively render impotent any decree of this Court reversing the order, and would in substance deprive appellants of their right of appeal.

This Court clearly has the power to prevent such a result, and it has repeatedly intervened to preserve its appellate jurisdiction. *French v. Shoemaker*, 12 Wall. 86, 100; *In re Alexander McKenzie, Petitioner*, 180 U. S. 536, 551; *United States v. Shipp*, 203 U. S. 563, 573; *Omaha & C. B. St. Ry. Co. v.*

Int. Com. Comm., 222 U. S. 582, 583. Indeed, it may well be urged that supersedeas would operate automatically in this case (*cf. Goddard v. Ordway*, 94 U. S. 672); but whether or not that is true, it is abundantly clear, for the reasons already urged, that a stay should be granted as of course under the circumstances of this case.

There are, moreover, other considerations which should move the Court to stay the order under review. This is not the appropriate place to discuss the merits of appellants' case, but the Court will have seen from the statement of jurisdiction and from the brief in opposition to the motion to dismiss or affirm that substantial and important questions of administrative law are involved. A stay of the District Court's order will be operative only for the few additional months that will elapse before this Court can decide the merits of the controversy. Impounding was discontinued on November 1, 1937, when the new rates went into effect, so that there is no present obligation resting upon appellees to place additional collections in escrow. Moreover, should the stay be now denied and the impounded funds distributed, restoration of the funds to the custody of the District Court, in the event that the order under review is reversed, would involve manifest practical difficulties. Substantial injustice would accrue to the farmers whom appellants represent were a procedural error permitted in its practical effect to

immunize the appellees from their substantive obligations under the Packers and Stockyards Act. Furthermore, adjudication of all the issues between the parties in one proceeding comports with traditional equitable principles. And behind the instant controversy lies the important principle of administrative justice to which appellants have adverted in their previous briefs. This Court has often shown its unwillingness to permit mistakes in administrative procedure to foreclose interests which deserve protection. *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Mahler v. Eby*, 264 U. S. 32; *Tod v. Waldman*, 266 U. S. 113. *A fortiori*, this Court should not foreclose such interests without full argument by failing to grant a stay pending appeal. Principles of equity as well as this Court's power to preserve its appellate jurisdiction combine to prevent a precipitous termination, without regard to the substantive rights of the parties, of a controversy that has been continuously in litigation for the past five years.

CONCLUSION

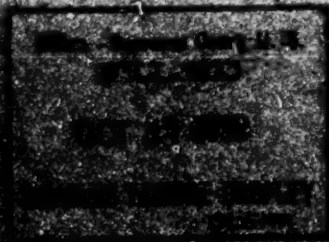
Appellants' petition for a stay and supersedeas should be granted.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

AUGUST 1938.

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In the Supreme Court of the United States

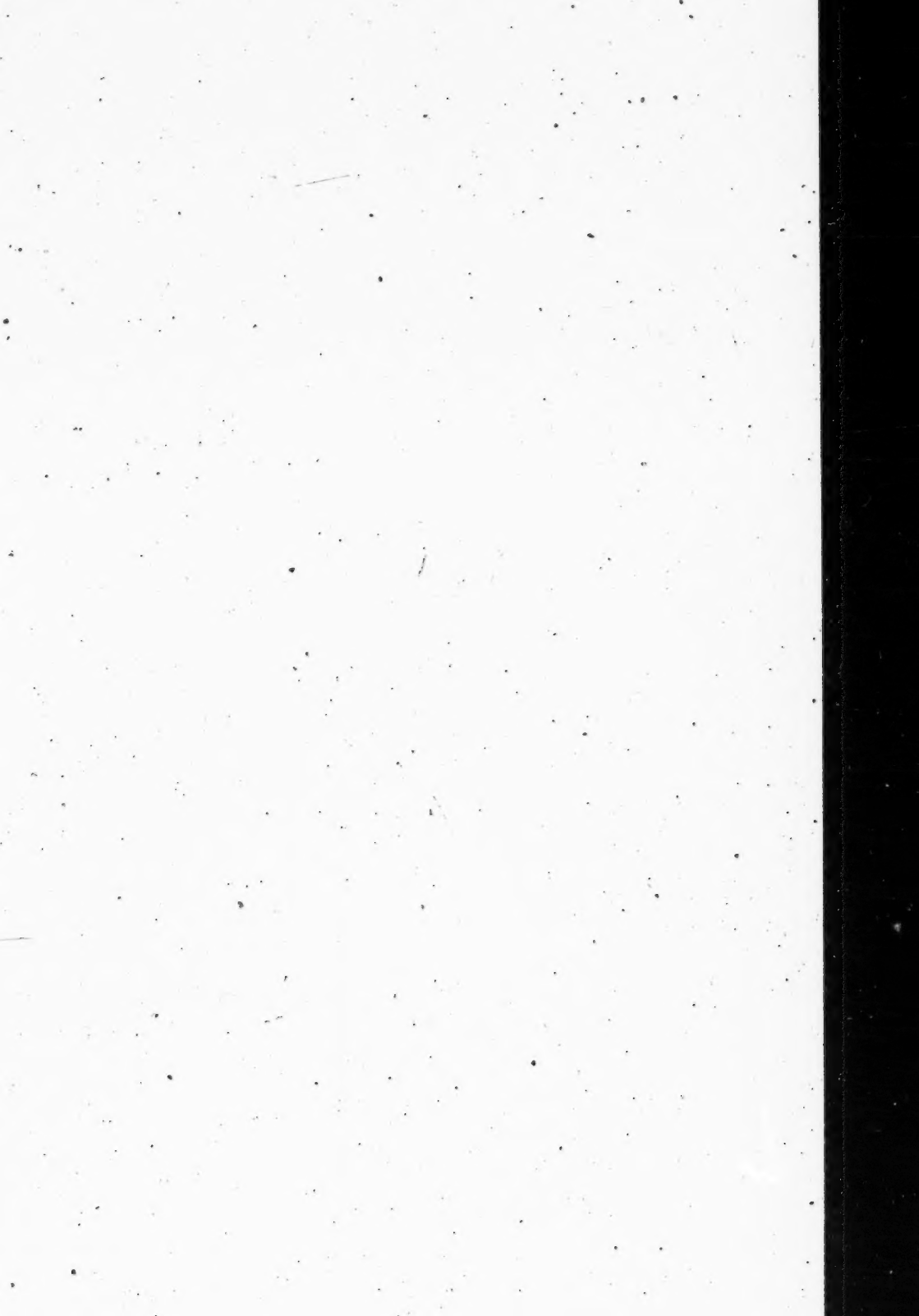
October Term 1931

THE UNITED STATES OF AMERICA AND THE SECRETARY
OF AGRICULTURE APPELLANTS

F. O. MORGAN, RESPONDENT AND F. O. MORGAN
SHOE MANUFACTURING COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY
OF AGRICULTURE



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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 248-250) is unreported.

JURISDICTION

The final order and decree of the District Court was entered on June 18, 1938 (R. 200-202). Petition for appeal was filed June 29, 1938 (R. 204) and allowed June 30, 1938 (R. 208). The order of June 18, 1938, has been stayed pending determination of

the cause by this Court. On October 10, 1938, this Court noted probable jurisdiction and postponed consideration of the motion to dismiss or affirm to the merits.

Jurisdiction of this Court is conferred by section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Title 7, Sec. 217), the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28, Secs. 44 and 47a), and the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether, in a suit to set aside an order of the Secretary of Agriculture establishing, pursuant to the Packers and Stockyards Act, maximum rates to be charged by market agencies, a determination by this Court that such order is invalid for the reason that the hearing before the Secretary was defective, requires the court below to direct immediate distribution to the market agencies of funds impounded by order of the court, representing the excess of the charges collected by the market agencies over and above the charges found to be reasonable by the Secretary.

2. Whether, in such case, distribution of the impounded funds must be stayed for a reasonable period sufficient to permit the Secretary by resuming the proceeding to correct the defect therein and to enter a reconsidered order determining the proper

charges for the period during which the funds were impounded, and thereby to establish to whom such funds should be paid.

STATUTE INVOLVED

The pertinent title of the Packers and Stockyards Act, 1921 (42 Stat. 159, 7 U. S. C., c. 9, 181-229), is reprinted in Appendix A, *infra*, pp. 78-90

STATEMENT

This appeal arises in connection with fifty individual suits, consolidated by stipulation of the parties for the purpose of trial and other proceedings (R. 169), which were brought in the United States District Court for the Western District of Missouri to suspend, enjoin, set aside, and annul an order made by the Secretary of Agriculture on June 14, 1933, prescribing maximum rates to be charged by market agencies at the Kansas City stock yards (R. 18-95). The order was made by the Secretary in a proceeding instituted under the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159, 7 U. S. C., c. 9, Sections 181-229) by order of April 7, 1930. (R. 21). The suits were commenced in the District Court on July 19, 1933 (R. 1). On July 22, 1933, the District Court entered a temporary restraining order (R. 129) conditioned upon the impounding, in the registry of the court, of the excess of the rates and charges collected by petitioners (appellees here) over and above the rates

and charges found to be reasonable by the Secretary of Agriculture in his order of June 14, 1933. The funds so impounded aggregated approximately \$580,000 on November 1, 1937, on which date impounding ceased because a new schedule of rates agreed upon by the Secretary and the market agencies thereupon became effective. The pertinent provisions of the restraining order follow (R. 130):

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

After the entry of the impounding order, the District Court proceeded to hear the cause, and, on October 29, 1934, rendered its decision upholding the Secretary's order and dismissing the bills of complaint (R. 230-237). The market agencies (appellees here) prosecuted an appeal to this Court, which, on May 25, 1936, reversed the District Court's decree and remanded the cases for further proceedings. *Morgan v. United States*,

298 U. S. 468. The District Court thereupon reheard the cases and again upheld the Secretary's order and dismissed the bills of complaint (R. 241-246). From this decision appellees prosecuted a second appeal and, on April 25, 1938, this Court rendered an opinion reversing the decree of the District Court. *Morgan v. United States*, 304 U. S. 1. The Court found that the Secretary had failed to grant the full hearing contemplated by the statute but refrained from passing judgment upon the merits of the order.

The United States and the Secretary of Agriculture (the appellants here) requested a rehearing on the ground, among others, that important questions as to the distribution of moneys impounded in the custody of the District Court remained undetermined. The market agencies, on the other hand, asserted that this Court by its decision on April 25, 1938, had held that the impounded funds belonged to the appellees and should forthwith be released to them. This Court denied rehearing, on May 31, 1938, and its *per curiam* opinion indicated that the controverted question as to the distribution of the impounded funds was to be considered in further proceedings. 304 U. S. 23, 26.

On June 2, 1938, the Secretary of Agriculture issued an order (R. 187-188) reopening the proceeding in which the controverted order of June 14, 1933, was entered, with a view to correcting the procedural irregularity and determining whether

or to what extent the order of June 14, 1933, should be corrected, after according to the appellees the procedural rights to which this Court had held them to be entitled.

Whereupon, the appellants, on June 11, 1938, made a motion in the District Court (R. 184-186) to have all further proceedings stayed and the Clerk of the District Court directed to retain the funds impounded until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. The District Court denied the motion (R. 250) and on June 18, 1938, entered an order directing that the funds be distributed to appellees (R. 200-202). It is this order from which the present appeal is taken.

On the same date that the District Court entered the order and decree from which appellants have appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement (R. 203-204). In that decree, however, the District Court retained jurisdiction so that—

such other proceedings [may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain * * *

This decree left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

An order allowing appeal from the order of June 18, 1938, was entered by the District Court on June 30, 1938 (R. 208). On the same day, however, the District Court denied without opinion appellants' motion for an order staying the enforcement of the order of June 18, 1938, pending the appeal to this Court.¹ Appellants thereafter applied for such a stay and a supersedeas to Associate Justice Butler, who referred the application to the Court and, pending a decision by the Court on the application, stayed and superseded the order of the District Court. On October 10, 1938, this Court stayed and superseded the order pending determination of the cause by this Court.

The Secretary's order (R. 187-188) of June 2, 1938, provided, *inter alia*, that "the Proceedings, Findings of Fact, Conclusion, and Order" as issued on June 14, 1933, be served upon appellees herein as the tentative findings of fact, conclusion, and order, and that appellees be given 30 days in which to file exceptions thereto and in which to make any appropriate motions or objections with respect to further proceedings. At appellees' request this time was subsequently extended to August 15, 1938.

¹ This order has been omitted in printing the record. See Index, R. ii.

On June 30, 1938, appellees moved to vacate the Secretary's order of June 2, 1938, on several grounds. On August 15, 1938, the appellees filed (1) an affidavit of bias and prejudice, (2) an affidavit as to changed conditions since closing of evidence, (3) exceptions to the tentative findings of fact, conclusion, and order, (4) a statement objecting to the procedure and rulings of the examiner in the prior hearing, and (5) further motions and objections with respect to the Secretary's order of June 2, 1938.

The Secretary, on August 26, 1938, issued an opinion dealing with the motions and affidavits referred to above.² After stating that some of the issues would be reserved for decision at a later stage, the Secretary denied the motion to vacate and denied the appellees' motion to disqualify himself for bias and prejudice, but granted the motion to appoint an examiner to hear further evidence relating to conditions subsequent to June 14, 1933. The order issued concurrently with the opinion directed the examiner to hear argument on the exceptions prior to the taking of additional testimony, and after taking such testimony to prepare and submit to the parties a report in accordance with the rules of practice. The hearing thereby ordered was, after notice, opened in Washington, D. C., on September 12, 1938, and, after argument

² The Secretary's opinion is reprinted in Appendix B, *infra*, pp. 91-99. A certified copy has been filed with the Clerk of this Court.

of exceptions and introduction of evidence by appellees, was adjourned until October 3, 1938, at Kansas City, Missouri, at which time all parties who had not appeared in Washington were to be given an opportunity to appear and present evidence. No additional parties appeared at the hearing of October 3, 1938, and, after introduction of affidavits of service, the proceeding was adjourned until further notice.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

1. In denying appellants' motion requesting said court to enter an order staying all further proceedings herein and to direct the Clerk of said court to retain in his custody the moneys impounded in said court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 2, 1938, and such final order shall have become of competent jurisdiction.

2. In granting appellees' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said court between July 24, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said court on July 22, 1933, and extended from time to time thereafter.

3. In holding that as a matter of law the funds now impounded in the custody of the Clerk belong to appellees.

4. In holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to appellees.

5. In holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. In directing the distribution to appellees of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the court of the ultimate ownership of said moneys.

7. In directing the distribution to appellees of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the court of the reasonableness of the rates and charges under which the said moneys were collected by appellees from their patrons.

SUMMARY OF ARGUMENT

I

The Packers and Stockyards Act provides that all rates and charges for the furnishing of stockyard services shall be just, reasonable, and non-discriminatory. Procedural machinery implements this basic requirement, but the positive duty to charge only reasonable rates is not conditioned by the validity of the procedural steps which may be taken to compel compliance with the Act. Appellees bore when this case was commenced and bear now after five years of litigation the statutory duty of charging and of having charged their patrons only reasonable rates. In view of the clear mandate of the Act, no disposition of this case can be made which does not determine whether the rates which appellees actually charged met the statutory requirements. Because the fund now impounded in the District Court was created by payments which represent the excess over a schedule of rates the reasonableness of which has never been judicially denied (and twice has been sustained), the farmers who made those payments obviously have an interest in the impounded fund and a right to insist, through appellants, that no disposition of the fund be made which would prejudice the rights that the Act confers on them.

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II

The right of the farmers to insist that the impounded fund be distributed on the basis of its true ownership cannot be defeated on the ground that reparation proceedings have heretofore been available or are now available as an adequate remedy for the recovery of charges claimed to have been excessive. For the Secretary to have made an award of reparation prior to the date his order was set aside would have required him not only to impeach that order, then under review, by assuming that it would not be enforced or obeyed, but to anticipate the decision of the court impeaching it. Moreover there is no basis upon which the farmers could heretofore have sought or could now seek reparation. No cause of action for reparation exists until payment of an unreasonable charge, and even at this stage of the litigation the charges which created the impounded fund and which, if unreasonable, would afford grounds for reparation have neither been finally collected from the farmers nor finally paid over to appellees.

If, however, a cause of action for reparation now exists or, upon the determination of this appeal adversely to appellants, would exist, it would not afford adequate relief to the farmers. Awards to them would be based on charges made during this litigation and up to November 1, 1937. Since the Secretary may not institute reparation proceedings on his own motion, it is clear that death, loss and

destruction of records, charges for attorneys' fees, and a ninety-day statute of limitation would combine to eliminate reparation as an effective remedy.

III

The Packers and Stockyards Act imposes a positive duty upon appellees which cannot adequately be enforced in reparation proceedings but can adequately and properly be enforced in this suit. Our contention in this respect is not foreclosed by the decision of this Court invalidating the Secretary's rate order. The very problem now presented to the Court was suggested by the petition for rehearing filed by appellants after the decision of April 25, 1938, in which appellants called this Court's attention to the fund impounded in the District Court and forecast the question which would arise as to its distribution. This Court in denying the petition for rehearing declared that the question as to the disposition of the impounded fund was not properly before it. Since that question was not before the Court it clearly was not decided, nor its present decision foreclosed.

IV

The proper basis upon which to distribute the impounded fund can best be determined by permitting the Secretary now to resume the proceeding in which the rate order in question was issued and, after according a full hearing to appellees, to

reconsider his original order. The corrected order will establish what were the reasonable rates to be charged during the period when the impounded fund was accumulated, and will thus provide a basis for the appropriate disposition of the fund.

There is ample authority in the Secretary of Agriculture to resume the proceedings and protect the rights both of the appellees and of their patrons, the farmers. The analogy to judicial procedure is compelling evidence that the vindication of procedural rights is consistent with substantive justice. The consequences of procedural error before an administrative body should be no different from the consequences of a corresponding error on the part of a court. The error which the Secretary committed did not render his order void in the sense that it could not be corrected by further proceedings, any more than a similar error would have foreclosed reconsideration of an erroneous decree by a court. *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311. This Court has in a similar case fully protected rights both of procedure and substance by recognizing the right of an administrative agency to cure its procedural errors and by giving joint operative effect to the first and to the corrected order. *Atlantic Coast Line v. Florida*, *supra*. Other courts, armed with the power to remand, have reached precisely the result for which appellant contend on facts analogous to the case at bar. *New York Edison Co. v. Maltbie*, 244 App.

Div. 436, 279 N. Y. S. 949; *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. 74, 281 N. Y. S. 233. Any objection that the New York cases involved direct review is met by decisions in which this Court on collateral review has protected substantive justice while providing for the correction of procedural irregularity. *Mahler v. Eby*, 264 U. S. 32; *Tod v. Waldman*, 266 U. S. 113. These several decisions taken together abundantly support the power of this Court so to condition its decree in this case as to avoid a result repugnant both to equity and to the aims of the Packers and Stockyards Act.

Appellees' objections to further proceedings by the Secretary are unsound. His reconsidered order will not be retroactive, but will on the other hand have no more retrospective effect than would a decree affirming his order after some years of litigation. A retroactive order is one which imposes liability without notice for conduct which has already occurred. If, for example, the legislature ratified the acts of executive officers which might otherwise have been attacked as invalid because of improper delegation of legislative authority, none can complain because his ground for attack upon the official action has been eliminated. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-302. Defects thus may be cured after the event in order "that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Graham & Foster v. Goodcell*, 282 U. S. 409, 430. Appellees'

fundamental error rests in viewing the further proceeding before the Secretary as a *new* rate proceeding. But this proceeding is merely ancillary to the original rate proceeding and to the invalidation by this Court of the Secretary's order for procedural error. Its only purpose and its only effect is to determine whether, and to what extent, the appellees have been prejudiced by the procedural defect in the earlier proceeding; this can appropriately be determined only by the Secretary. Finally, in *Atlantic Coast Line v. Florida*, 295 U. S. 301, the Court gave a retroactive force to the second order, which cured the defect in the first order, although the pertinent statutory provision was identical to that now under consideration.

The appellees' argument that the funds must immediately be distributed to them because of the terms of the impounding order is unacceptable. There has been no "final disposition of this cause" until the Secretary has corrected the procedural error and reached a determination on the merits. Any other conclusion would contradict not only the further terms of the order indicating that the funds were collected "on behalf" of the farmers but the basic purposes of the Act.

The suggestion of appellees that there is no distinction between substantive and procedural error is contradicted by centuries of legal thought and by the decision of this Court in *Atlantic Coast Line v. Florida*, *supra*, 311, 312, 313, 315, 316. And, of

course, our analysis is equally applicable to errors of substance which do not go so far as to leave the order incapable of correction.

We cannot emphasize too strongly that sound government requires that courts and administrative agencies cooperate to secure both procedural and substantive rights. To confer substantive immunity because of procedural error would be to offer a rich reward for dilatory tactics and procedural entanglements on the part of parties not anxious to submit to regulation; the administrative agency hardly could hazard the substantive results of the proceeding upon its denial of any procedural claims, however far-fetched they may be. The unquestioned importance of procedural safeguards does not necessarily mean disruption of the administrative process; if the tribunal is given the same opportunity to correct its mistakes as is a lower court, both procedural and substantive justice can be preserved. The increasing importance of the administrative tribunal in the work of the federal judicial system means that it is a matter of importance to the courts, equally with the administrative agencies, that the specialized knowledge of the administrative tribunal and the background of judicial experience cooperate to produce good government. In the words of this Court in *Atlantic Coast Line v. Florida*, *supra*, 316, this situation "is a summons to a court of equity to mould its plastic remedies in adaptation of the instant need."

ARGUMENT

I

THE ACT CONFERS SUBSTANTIVE RIGHTS UPON THE
FARMERS

It is unnecessary here to elaborate upon the broad purposes sought to be accomplished by the Packers and Stockyards Act. They have been described and approved by this Court (*Stafford v. Wallace*, 258 U. S. 495, 513-516; *Tagg Bros. v. United States*, 280 U. S. 420, 436-439), and are written plain on the face of the Act. So far as the stockyard regulation is concerned, the basic provisions are Sections 304, 305, and 307. Section 304 makes it the duty of every stockyard owner to furnish non-discriminatory and reasonable stockyard services. Section 305 provides:

All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

Section 307 embodies the same requirements as to regulations and practices in respect to the furnishing of stockyard services.

These sections, of course, were not designed to be merely hortatory. They enacted a substantive rule of law which was to govern every transaction between the market agency and its patrons. But,

to ensure compliance with the statutory mandate, Congress also enacted two procedural remedies.

Sections 308 and 309 operate after the fact by conferring on a stockyard patron a cause of action to recover full damages for a violation of the Act. This cause of action may be asserted in reparation proceedings either before the Secretary or in any district court of the United States of competent jurisdiction. Cf. *Sullivan v. Union Stockyards Co.*, 26 F. (2d) 60 (C. C. A. 8th). Section 310, on the other hand, operates prospectively by giving the Secretary authority either on his own motion or on the motion of an interested person to prescribe reasonable rates and charges for the future. The language of that section is as follows:

Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case * * *

The Act thus provides merely a general statutory framework and wisely does not attempt to articulate the infinite details of procedure. Doubtless Congress had in mind that this Court has power to mold the statute to effectuate substantive justice. Cf. Landis, *Statutes and Sources of Law* (Harvard Legal Essays, 214). This generality of the enactment makes it all the plainer that these procedural sections of the Act were designed merely to afford a means of attaining the goal which Congress set in Section 305, namely, that "all rates * * * shall be just, reasonable, and nondiscriminatory."

Most of the difficulties of this case disappear when examined in the light of this basic, and apparently indisputable, relationship between the substantive and the procedural sections of the Act. The issue between appellants and appellees, for example, seems to reduce itself to the simple choice between construing the procedural sections as an end in themselves and construing them in a manner to guard the substantive rights of the farmers conferred by Section 305.

The fund impounded in the District Court—which that court has ordered distributed to appellees—represents the difference between the rates appellees charged during this litigation (up to November 1, 1937) and the rates fixed by the Secretary as reasonable. This Court has not yet passed on the merits of the Secretary's order, so the rea-

sonableness of the rates prescribed has not yet been finally determined. But, certainly, every available indication points to the validity of the Secretary's order. The proceedings before him explored the issues with great detail—the testimony covered 10,000 pages and the exhibits another 1,000 pages (304 U. S. at 16). The Secretary made elaborate findings (R. 26-94). The majority of the District Court on the first hearing said ³ (R. 164) :

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases, only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence, but are in accordance with the weight of the evidence.

While Judge Reeves upon rehearing appears to have wavered somewhat as to the reasons for dis-

³ It will be noted that the District Court, in exercising its independent judgment, gave a more thorough-going review than was required under the statute or Constitution. See the subsequent decision in *Acker v. United States*, 298 U. S. 426.

missing the bill (R. 241), the majority of the court on the second hearing, after the remand by this Court, stated (R. 246):

We have reached the same conclusion on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

Thus, while the ownership of the impounded fund has never been fully determined, it is evident that the claim of the farmers cannot be dismissed as insubstantial. The Secretary, and on two occasions the District Court, have affirmatively declared the rates fixed in his order to be reasonable. No court or tribunal has held them to be unreasonable. If Section 305 is to be given any meaning, we do not see upon what basis—in the face of this consistent record of determinations that the funds collected from the farmers were in excess of a reasonable rate—the appellees can be given the impounded funds. The order of the court below, directing payment to the appellees, denies the substantive rights of the farmers not only without a determination that the rates charged by appellees were reasonable but in direct disregard of three determinations to the contrary. We cannot believe that orderly administration of the judicial process can produce such a result.

The importance of the procedural safeguards of Section 310 may not be minimized. Certainly we have no disposition in any manner to weaken their force or to suggest that the substantive rule of the

statute can ever justify a departure from procedural requirements. But we do insist that, irrespective of any action which the Secretary of Agriculture may have taken, the appellees remain under a duty to obey the mandate of Section 305. If, as was the case here, the Secretary erroneously failed to heed the procedural safeguards of Section 310, that error must be corrected. But, almost too plainly for argument, the procedural error does not confer upon appellees an immunity from the substantive provisions of Section 305. Appellees deny the Secretary's power to correct this error, and apparently contend that their duty to obey the command of Section 305 is conditioned by the validity of the procedural steps which the Secretary may have taken against them to compel the discharge of their duty. But the Packers and Stockyards Act, in Section 305, fixes the substantive rights of the farmers and requires that the procedural mechanisms evolved within the general framework of the Act be directed toward the cardinal requirement of the stockyard regulation: "all rates * * * shall be just, reasonable, and nondiscriminatory."

II

THE FARMERS' SUBSTANTIVE RIGHTS CAN ADEQUATELY
BE PROTECTED ONLY IN THIS PROCEEDING

If it be admitted, as it must, that the Packers and Stockyards Act gives the farmers a substantive

right to be charged only reasonable rates,⁴ the only remaining question is how these rights are to be preserved after the Secretary of Agriculture has made a procedural error. Appellees can adopt the bold position that the farmers are left without any means of translating their statutory right into a practical benefit. It seems unlikely that they would press their argument so far and improbable that this Court would accept a construction which so emasculated the Act. The only remaining alternatives which could permit affirmance of the District Court are either that the farmers have once had an adequate remedy during this litigation for the protection of their rights, which they have now lost, or else that they now have such a remedy. It is certainly true that only if one of these two propositions be established can appellees show any justification for the present release to them of the impounded fund. Otherwise the result would be that for more than four years, and under the order of a court of equity, charges of undetermined and extremely doubtful reasonableness have been collected which those compelled to pay them have been and are now helpless to challenge.

⁴ Appellants—the United States and the Secretary of Agriculture—are, of course, empowered as “the public representatives” of the interest of the farmers in the impounded fund to urge that no distribution prejudicing the rights of the farmers should be made. *Cf. In the Matter of Lincoln Gas & Elec. Co.*, 256 U. S. 512, 517; *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146.

1. The only means by which the farmers, appellees' patrons, might heretofore have protected their substantive rights against a possible invalidation of the Secretary's order because of procedural error would have been by bringing proceedings for reparation under section 308 of the Act. But there are insuperable objections which lie in the way of any contention that the farmers ought heretofore to have brought reparation proceedings before the Secretary. Section 308 has been construed to require that application to the Secretary precede institution of a suit. *Sullivan v. Union Stockyards Co.*, 26 F. (2d) 60 (C. C. A. 8th).³ Clearly, the Secretary had no jurisdiction, during the pendency of this suit, to award reparations for rates being collected under order of court. For, if the Secretary were to have made an award, he would have been forced not only to impeach his own previous order then under review, by assuming that it would not be enforced or obeyed, but also to anticipate the decision of the court impeaching it.

An equally irrefragable objection to appellees' argument is that, during the pendency of this litigation, the essential basis for an award of reparation has not existed. The charges which, if unreasonable, would afford grounds for reparations, have

³ If the *Sullivan* case is erroneous, so that application can be made directly to the District Court, equivalent considerations preclude reparation action by that court pending disposition of the proceeding in the three-judge court.

neither been finally collected from the farmers nor finally paid over to appellees. Accordingly, no cause of action has ever accrued to the farmers. Section 309 (a), *infra*, p. 84.

Traced to its source, the falsity of appellees' contention is found to lie in the assumption that appellees had original and continuing ownership of the payments which created the impounded fund; from this appellees argue that the farmers' causes of action for reparation accrued each day as payments were made. But clearly neither appellees nor the farmers had any original and continuing claim to that part of the collections in excess of the rate prescribed by the Secretary's order. The District Court, acting upon its right to do all things necessary to preserve and make effective its jurisdiction, held the money either for the market agencies or for the farmers; neither had title to it, each had an expectation of ultimately receiving it. The point is made clear by an examination of the language of the impounding order (*supra*, p. 4). Under its terms appellees were required to deposit in court all collections in excess of the rate prescribed by the Secretary and to file verified statements of the names and addresses "of all persons upon whose behalf such amounts were collected." These words do not bespeak ownership in appellees of the amounts collected and impounded—unless, indeed, it be the ownership of a trustee. The persons "upon whose behalf" the excess charges were

collected and impounded were the farmers who were being compelled by the restraining order to pay a rate found by the Secretary to be unreasonable. They were the persons to whom it was contemplated that the whole or a part of the impounded fund might become distributable. The language of the impounding order recognized their potential claim to the fund and forecast the time when distribution would be made according to the substantive rights of the parties under Section 305.

Under these circumstances it is manifestly unreasonable to assert that the farmers ought to have gone through needless and burdensome reparation proceedings for the purpose of raising and having determined the very issue which was already before the District Court. That reparation proceedings would have been burdensome to all parties concerned requires no demonstration. That they would have been needless ought to be clear enough, for at least until the validity of the Secretary's order was finally settled it could not have been known that the farmers were not already the lawful owners of the impounded fund which represented the charges in excess of his order.

2. The only question remaining, therefore, is whether the farmers may *now* maintain proceedings effectively determining their substantive rights to pay only reasonable rates and to receive back any amounts paid, under the court order, which may have been in excess of such rates.

Certainly up to the moment of this Court's decision invalidating the Secretary's order the farmers could not properly have brought reparation proceedings.⁶ It does not follow, however, that their causes of action under the statute arose when the order was set aside, for although this Court held the order invalid it also ruled in its opinion on the petition for rehearing that its decision did not settle the question as to the ownership of the impounded fund. It cannot be known, therefore, until the determination of the issue presented on this appeal that the farmers have no recourse but to reparation proceedings. In the present status of this case it is not clear that the funds in question do not lawfully belong to the farmers and thus they cannot yet show a cause of action for reparation.

Should this Court uphold the action of the District Court in ordering distribution of the impounded fund to appellees, the farmers would be remitted to their remedy by reparation (or possibly restitution) if they are to be protected at all in this case. The inequity of forcing such a course upon them is manifest. The years which have passed since their payments were made have unquestion-

⁶ In the text we shall discuss only reparation proceedings. It may be that the farmers could bring a bill for restitution (cf. *Atlantic Coast Line v. Florida*, 295 U. S. 301), but this action would be subject to the same practical disadvantages as would be the reparation proceeding.

ably brought with them changed conditions which would make relief by reparation illusory. Many of the parties, both farmers and market agencies, would have died or gone out of business. Records would have been lost or destroyed. Especially in view of the ninety-day period of limitation, it is doubtful that more than a small fraction of the farmers would take the affirmative action of instituting proceedings. Attorneys' fees and the necessary multiplicity of action would discourage those who considered suit. These practical difficulties, even if appellees were to concede that reparation proceedings may still be brought, would very effectively remove all possibility that adequate justice could in this manner be done to the farmers.

It might be thought that some of the difficulties arising out of dissipation of the impounded fund could be obviated by an order directing that the fund be held for a reasonable time for disposition in accordance with orders duly made by the Secretary in reparation proceedings under Section 309. If the only means of determining on the merits the reasonableness of the rates which produced the impounded fund were a reparation proceeding, clearly a court of equity could not do less than make such an order, for the farmers obviously have an equitable right to the preservation of the fund, created out of payments made by them under order of court, until the validity of the charges they were compelled to pay can be determined. But because of the difficulties to effective reparation, such a disposition of the case, as a practical matter, would afford the farmers little, if any, relief.

III

THE RIGHTS OF THE FARMERS HAVE NOT BEEN FORE-
CLOSED BY THE PRIOR DECISIONS OF THIS COURT

Appellees, not unnaturally, have devoted little argument to establish any other remedy of the farmers. They insist, instead, that the problem begins and ends with the decision of this Court on April 25, 1938, holding the Secretary's order invalid. 304 U. S. 1. This decision, they insist, compelled the District Court forthwith to pay over to them the impounded funds, and meant that any other course would have been in disobedience to the mandate of this Court.

The opinion of the Court on May 31, 1938, denying the petition for rehearing (304 U. S. 23), makes it clear that this question was not thereby concluded. It will be recalled that appellees argued to this Court, in opposing the petition for rehearing, that this cause had been terminated by the reversal of the District Court's decree and the invalidation of the Secretary's rate order, with the result that distribution to them of the moneys impounded in the District Court followed automatically.* Appellants, on the other hand, argued that the procedural error of the Secretary in not according appellees a full hearing, and the invalidation of his rate order because of that error, did not determine the substantive statutory right of appellees'

* Memorandum in Opposition to Petition for Rehearing, pp. 12-13.

patrons to be charged only reasonable rates, or foreclose determination of that right.* With this issue before it, this Court said (304 U. S. at 26):

* * * The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

Since the Court declared that the question as to the disposition of the impounded fund was not before it, no sensible argument can be made that the decision of the Court determined that question. Moreover, since this Court did not undertake to determine the question as to the ownership

* Petition for Rehearing, pp. 9-15; Memorandum in Reply to Memorandum in Opposition to Petition for Rehearing, pp. 4-12.

of the fund, its mandate could not possibly have compelled the District Court to order automatic distribution of the fund to appellees.

The appellants, of course, are not arguing that this Court has already held that appellees have no claim to the impounded fund, but simply that invalidation of the Secretary's rate order did not establish that claim. The briefs filed in support of and in opposition to the petition for rehearing raised the question of the ownership and distribution of the impounded fund. This Court held only that these questions, "both of substance and of procedure," did not depend upon the terms of the impounding order, or upon any other matters then in the record, but upon matters not in the record which the Court should not "attempt to forecast or hypothetically to decide." Chief among these matters was the question of "what further proceedings the Secretary may see fit to take in the light of our decision."

IV

THERE IS AMPLE AUTHORITY IN THE SECRETARY OF AGRICULTURE TO RESUME THE PROCEEDINGS AND PROTECT THE RIGHTS BOTH OF THE APPELLEES AND OF THE FARMERS

It has been shown that the Packers and Stockyards Act gives to the farmers a substantive right to receive stockyard services at no more than reasonable rates, and that the Secretary's order fixing such rates has twice been sustained on the merits

by the District Court. It has been shown that these substantive rights of the farmers cannot adequately be preserved by reparation proceedings. These rights plainly can be protected by an order staying the distribution of the impounded funds until the Secretary, after according to appellees the full hearing prescribed by this Court, has reconsidered his original order and has provided a basis for the appropriate distribution of the impounded funds. The only remaining question is whether there is anything in the Act or in the decisions of this Court which forbids this course of action. It will be seen, we submit, not only that there is nothing to forbid so sensible a procedure but also that the decisions of this Court and of other courts affirmatively support the appellants.

A. THE ANALOGY TO JUDICIAL PROCEDURE IS COMPELLING EVIDENCE THAT VINDICATION OF PROCEDURAL RIGHT IS CONSISTENT WITH SUBSTANTIVE JUSTICE

This appeal deals with a case of complex but not conflicting social values; a case in which it is the duty of the courts to recognize and safeguard the essential guaranties of one group without destroying the rights of another. A solution of the problems of this case comes readily once it is recognized that appellees' right to a full hearing is not something alien to and apart from their patrons' right to be charged only reasonable rates.

Appellees' argument strikes an anachronistic note. The reasons for the ruthless procedural per-

fection of the ancient common law were pointedly illustrated by Chief Justice Eyre in *Morgan v. Sargent*, 1 Bos. & Pul. 58, 59-60:

You must argue it as a mere point of form; if you attempt to argue on the substance, you must fail. This is a slip in form; but it is always the best way to make the party pay for this kind of slip, if advantage is taken of it by special demurrer. * * * The party * * * must pay for his blunder.

But this is a tradition which has long since been discarded in our jurisprudence. It is unnecessary to discuss the revolution in legal procedure which has occurred since Chief Justice Eyre admonished counsel in 1797. It is sufficient that civil procedure is no longer notable chiefly as a vehicle for display of the *elegantia* of the lawyer's craft but fulfills its function only so far as it permits a ready decision on the merits. See, e. g., Rule 61 of Federal Rules of Civil Procedure.

Appellees urge, in effect, that administrative tribunals be held to far stricter standards than inferior courts, so far as concerns the consequences which follow upon procedural errors. We find this position difficult to comprehend. The administrative tribunal, of necessity, proceeds upon a much more informal basis than do courts. Its procedure is not and cannot be crystallized, in view of the volume of work and type of questions with which it must deal. The statutes governing the

procedure of administrative tribunals, accordingly, are uniformly cast in the most general terms. In addition, these administrative agencies are a development so recent that neither experience nor the decisions of this Court have yet produced any very definite guiding principles of procedure. Certainly, when its procedure is designedly less formal, the consequences of procedural error before an administrative body should be no different from the consequences of a corresponding error on the part of a court. Appellees, however, cannot rest upon a demand so modest as to have the consequences of error in judicial proceedings applied to administrative proceedings. They must, to carry their argument, induce this Court to follow them to the paradoxical point that procedural errors, in the much less formal administrative proceeding, have consequences far more drastic than those in the highly crystallized proceedings in inferior courts.

Administrative irregularity is not essentially different from judicial irregularity. There is no need to expand upon the procedure of courts in correcting judicial error. This Court has frequently reversed a decree because procedural error was committed by an inferior court and later has considered the lower court's decision on the merits after the procedural error had been cured. E. g., *Allen v. United States*, 150 U. S. 551; 157 U. S. 675; 164 U. S. 492; *Sullivan v. Iron Silver Mining Co.*,

109 U. S. 550; 143 U. S. 431; *Lincoln Gas Co. v. Lincoln*, 223 U. S. 349; 250 U. S. 256; ~~108 U. S. 451~~; *Union Pacific Railway Co. v. United States*, 104 U. S. 662; 117 U. S. 355. Neither the Court nor the litigants would have entertained the suggestion that the commission of procedural error by the inferior court had terminated the case or that it had foreclosed the substantive rights which the cause had been instituted to adjudicate. Appellants contend for no more than that courts and litigants adopt the same view in cases involving orders of administrative tribunals. The struggle of common law courts against hypertechnicality has been inspired by the realization that ultimate justice should be the end of all litigation. Appellants contend it should be so in administrative no less than in judicial proceedings.

The problem, then, is how to protect appellees' right to a full hearing while at the same time safeguarding the farmers' right to be charged only reasonable rates. Should the impounded fund be distributed to appellees without a final determination ever having been made of the reasonableness of the rates appellees charged, the farmers' right to be charged only reasonable rates will not have been adequately protected, if, in fact, such rates were unreasonably high. The common-sense solution is to permit the Secretary now to cure the procedural defect in his first determination, and then to enter a reconsidered order fixing the rates, such that the District Court may know how the impounded fund should be distributed.

Appellees contend that correction of the "wholly invalid" rate order is impossible. It seems clear enough that they can not be sustained in this respect. This Court, in its opinion of April 25, 1938, did not hold that the Secretary's rate order of June 14, 1933, was void. What the Court said was that, since the hearing was fatally defective, the order of the Secretary was invalid. Appellants have no disposition to quibble over terminology; the point is simply that the Secretary's order did have legal consequence until set aside. It was invalid in the sense that its validity could successfully be contested by appellees by direct attack in the courts. The order clearly was not a complete nullity. *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311. The proceeding, of course, was not a sham or pretense (cf. *Moore v. Dempsey*, 261 U. S. 86). If appellees had not moved to enjoin its enforcement, they clearly could not have ignored its existence and have refused to comply with its terms. "Obedience was owing while the order was in force." *Atlantic Coast Line v. Florida*, *supra*. This is true because the Secretary had jurisdiction over the parties and over the subject-matter; if he proceeded improperly or contrary to law, he was guilty of error subject to correction on review. The distinction between error and want of jurisdiction is thoroughly established in our judicial procedure. The *Atlantic Coast Line* case demonstrates that the distinction is no less applicable to administrative agencies and proceedings.

The point which appellants make may be illustrated by the example this Court used in its opinion of April 25th. Its appositeness is the more striking since appellees here urged the identical analogy to this Court in their brief (p. 80) and in oral argument on the prior appeal. If in an equity cause the special master or chancellor permitted plaintiff's attorney to formulate findings upon the evidence and conferred *ex parte* with plaintiff's attorney regarding them, and then adopted the findings without affording defendant's attorney an opportunity to know their content and to present objections, there would be no hesitation by the appellate court in setting aside the report or decree as having been made without a fair hearing. But the decree would be subject only to direct attack; it could not be impeached collaterally. Unless and until the party aggrieved by it appealed and secured its reversal, the decree would stand as an adjudication of the rights of those concerned. Appellees would not argue that such a decree had no legal consequence.

We may take the example a step further. Appellees would not contend in the supposititious equity suit that a reversal of the trial court's procedurally erroneous decree adjudicated the substantive rights of the parties. Indeed, the suggestion that because defendant had been denied a fair hearing he should, upon reversal of the procedurally erroneous decree, be awarded a judgment on the merits would summarily be rejected. Where a serious procedural defect arises in the course of a

hearing before a master, the appellate court must reverse the decree confirming his report; but the cause may be remanded for resubmission to the master and the substantive rights of the parties remain unaffected until a valid judgment has been reached on the merits.

But appellees' thesis will not permit them to concede such a just result in administrative proceedings. In order for them to prevail they must argue that the Secretary's error in denying them a full hearing had the inescapable effect of defeating the Congressional mandate that they charge their patrons no more than reasonable rates. Appellees are contending that although in the supposititious equity suit the procedurally erroneous decree has legal consequence, an administrative agency's procedurally erroneous order has none; that although the procedurally erroneous judicial decree leaves substantive rights unaffected, the procedurally erroneous administrative order forecloses them. The District Court has subscribed to this view. The proposition, if it were accepted by this Court, would effectively destroy a substantial part of the value and efficiency of administrative agencies.

B. THIS COURT IN A SIMILAR SITUATION HAS PRESERVED SUBSTANTIVE JUSTICE BY GIVING EFFECT TO THE ADMINISTRATIVE AGENCY'S CORRECTION OF PROCEDURAL ERROR

Since the error of the Secretary did not deprive him of jurisdiction over the parties or the subject-matter, the proceedings were not a nullity and may be continued with the purpose of curing the pro-

cedural error which made the original order invalid. More particularly appellants insist that the Secretary has the power, inherent in any judicial or administrative tribunal, to resume the proceeding wherein he committed error, and after according appellees the rights to which they are entitled, enter a reconsidered order. From this it follows that the District Court should have recognized that power and preserved the *status quo* during its exercise. Appellants are not without authority for this principle of administrative law for which they contend. Cases in law and equity, which present illuminating analogies, are, of course, numberless. In addition, there are cases involving administrative proceedings which, though not numerous, persuasively support appellants' position on this appeal.

Atlantic Coast Line v. Florida, 295 U. S. 301, is such a case. There a rate which the Railroad Commission of Florida had fixed for the transportation of logs in intrastate commerce was so low as to be unjustly discriminatory against interstate commerce. The Interstate Commerce Commission undertook to prescribe a higher rate which would supersede the State rate and remove the existing discrimination. The order which the Commission first entered was upheld by the three-judge district court but was set aside by this Court because the Commission had failed adequately to find and state the facts upon which the validity of its order depended, namely, the facts showing that the intra-

state rate caused unjust discrimination against interstate commerce (282 U. S. 194). The Commission took the case back, reopened it, heard new evidence, made new findings, and prescribed the same rate which it had put into effect before. This second order was upheld by this Court (292 U. S. 1).

The third appeal (295 U. S. 301) presented a different question. The first order of the Commission had been upheld by the three-judge court, and the carrier had collected the higher rate from the date of the three-judge court's decree dismissing the shippers' bill until the mandate of this Court reversing that decree was filed in the lower court. When the mandate of this Court went down, the shippers, who had been compelled by the erroneous order of the lower court to pay the higher rate, petitioned for an order of restitution against the railroad. The lower court ordered a reference to determine what disposition in equity and good conscience should be made of the case. Its conclusion was that equity required only partial restitution. This Court held that the shippers were entitled to no restitution at all. The reasoning of the Court was that restitution was not a matter of right operating automatically, but rested in discretion, to be ordered or refused according to the equitable principles applicable in actions for money had and received; that the evil which the Commission's first order was designed to correct was one which positive statutory command prohibited and made un-

lawful; that the attempted correction of the evil in the first instance had failed only through a defect in the form of the Commission's order, through a procedural slip; that the subsequent order, wherein the defect had been cured, showed a continuation of the evil; and that the rates collected under the first invalid order were shown by the second and valid order to have been fair and reasonable, so that in equity and good conscience the shippers could not say they were entitled to the restoration of what was a proper charge in the first instance.

The opinion of the majority has significance here in several respects. The Court obviously regarded the defect in the Commission's first order as being curable and regarded the Commission as having the power to cure it. It spoke of the Commission as having "cured the defect in form of its earlier decision" (295 U. S. at 311). It said that the Commission in its first attempt to discharge its duty under the applicable statute "was foiled through imperfections of form, through slips of procedure" (p. 312). More significant, perhaps, is the fact that this Court recognized that the invalid first order, though it was never, as such, validated, retained some vestige of legal consequence even after being set aside. Indeed, to such an extent did its force continue that this Court considered it together with the second order in determining what the proper rate should have been during the period when no valid order of the Interstate Commerce Commission was in existence. The Court recog-

nized that the need to eliminate discrimination against interstate commerce was not removed by a procedural error and that the Commission's imperfect order, directed against the evil but missing the mark because of procedural error, had to be regarded as relevant in the inquiry whether the railroad had received money which it was in equity bound to return. The Court said (p. 312):

Unjust discrimination against interstate commerce, "forbidden" by the statute, and there "declared to be unlawful," * * * does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning.

The *Atlantic Coast Line* case also was not without its procedural difficulties, as the majority and dissenting opinions both recognized. There was the obvious difficulty that the rates which the Coast Line had collected were not supported by any lawful order and that the shippers would not have been compelled to pay those higher rates but for the trial court's error in holding the Commission's order valid. A greater difficulty, and one insuperable to the minority, was that denying restitution, under the circumstances of that case, was tantamount to sanctioning the carrier's

violation of a lawful rate order of the Railroad Commission of Florida—for if there was no valid order of the Interstate Commerce Commission in existence the State rate was applicable. The majority of the Court was not prevented by these obstacles from reaching what it regarded as an equitable solution of the perplexing problem; it came to the conclusion “that restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements” (p. 312).

Appellees have argued that the *Atlantic Coast Line* case is inapplicable here. Of course, that case and this one are not fact-for-fact the same. But they have sufficient points of contact to indicate with some clarity the proper approach to a problem not yet thoroughly worked out by the courts. We have here the Secretary of Agriculture, as an administrative agency, charged with the duty of correcting the evil of unreasonable and discriminatory rates, and attempting, though imperfectly, to correct it. The failure of his first attempt resulted from his denial of a full hearing to appellees, and this Court has completely protected and vindicated their rights, just as it protected the rights of the shippers in the *Atlantic Coast Line* case, by declaring the rate order invalid and unenforceable. This Court in the *Atlantic Coast Line* case protected the shippers' rights just as far as they were entitled to have them protected, and no farther. They were entitled to all procedural safeguards

and the Court effectively required that the Commission accord them their rights. But the shippers sought to extend their claims beyond any point necessary to give them full protection, to a point, indeed, where the completely vindicated procedural rights would have been made the instrument for defeating substantive rights. This Court would not make its processes available for the attainment of such a result. It found the parties in a situation where equity had been done, where the rights of the parties had been protected just as far as justice required, and the Court left the parties where it found them.

In the *Atlantic Coast Line* case the minority felt that the decision of the Court invaded the right of a sovereign state to regulate intrastate rates so long as no valid rate of the Interstate Commerce Commission covered the field. Of course, no problem of conflicting sovereignties is presented here, so, putting that aspect of the *Atlantic Coast Line* case aside, the chief point of difference between that case and the one at bar is that there the carrier had already received the rates fixed by the invalid order while here the farmers have not yet actually had the benefits of the reduced rates, but the differential has instead been paid into court. But if the court of equity will stay its hand in order to protect the carrier against a technically persuasive claim for reparation, in obedience to the statutory

prohibition of discrimination against interstate commerce, so too will it mold its decree to protect the farmer against dissipation of the impounded funds until the merits of this proceeding have been decided. The accidents of procedure differ as between the two cases, but the basic question as to the flexibility of the powers of a court of equity and the occasion for their exercise in obedience to the statutory mandate are identical.

Here, as in the *Atlantic Coast Line* case, the vindication of appellees' rights need go only so far as is necessary to assure them the full hearing to which they are unquestionably entitled and may not properly go beyond that point and grant them immunity from the substantive provisions of the Act to the prejudice of the rights of their patrons, the farmers. Just as the procedural rights of the shippers and the substantive objectives of the statute were protected by the Commission in curing the defect in its first decision, so appellants assert that appellees' procedural rights and the farmers' substantive rights may in this case be protected by permitting the Secretary to cure the procedural defect in his first order. Just as the original order of the Commission, when coupled with its second order, provided in the *Atlantic Coast Line* case the basis for determining the money liability between the railroad and the shippers, so the reconsidered order of the Secretary in this case will provide the basis for determining how the impounded fund should be

distributed. The spirit of the *Atlantic Coast Line* case, as well as the positive command of the Packers and Stockyards Act, will be set at naught if appellees succeed in defeating their substantive obligations under the Act. And, because of the practical inadequacy of remedy by way of reparation, appellees will effectively defeat their substantive obligations under the Act if they are permitted now to receive the impounded fund without there having been any definitive administrative or judicial determination of the reasonableness of the rates which produced it.

C. OTHER COURTS, ARMED WITH THE POWER TO REMAND, HAVE REACHED THE PRECISE RESULT FOR WHICH APPELLANTS CONTENTEND ON FACTS ANALOGOUS TO THE CASE AT BAR

The *Atlantic Coast Line* case demonstrates that this Court, on facts more difficult than in the instant case, has molded its processes in order to ensure administrative justice, even though the initial challenge to the order was made in a proceeding which in form was collateral, such that this Court could not remand directly to the administrative tribunal for correction. Compare *Pacific Gas & Electric Co. v. Railroad Commission*, 16 F. Supp. 884 (N. D., Cal.). It is not surprising, therefore, to find that other courts, armed with the express power to remand the case directly to the administrative agency, have reached a similarly just result. *New York Edison Co. v. Maltbie*, 244 App. Div. 436 (3d Dept.), 279 N. Y. S. 949; *Brooklyn*

Union Gas Co. v. Maltbie, 245 App. Div. 74 (3d Dept.), 281 N. Y. S. 233. These cases involve substantially similar facts, and it will be sufficient to examine *New York Edison Co. v. Maltbie*. There the New York Public Service Commission fixed temporary emergency rates for electrical energy to be sold in New York City for a one year period. No general rate proceeding was instituted or pending at the time—the Commission simply undertook to lower the existing rates for a period of one year. The electric companies affected by the orders secured in a trial court a restraining order against enforcement of the orders (150 Misc. 200, 270 N. Y. S. 409), but that court required them to impound the difference between the old rate and the new temporary rate. This restraining order remained in force during the year and over eight million dollars were impounded. The electric companies obtained certiorari in the Third Department of the Appellate Division to review the Commission's orders. That court held the temporary emergency rate orders invalid, not only because there was lacking any authority in the Commission to make a temporary rate order except in conjunction with a general rate inquiry but also because the Commission had made several serious errors in arriving at the rate bases which it used. By the time the Appellate Division rendered its opinion invalidating the orders the year during which they were to be effective had passed and all impounding

under the restraining order had ceased. The court said, as to the disposition of the impounded fund (279 N. Y. S. at p. 960):

By the terms of the orders under review in this matter, the period during which the rates were to apply has past. The final determination as to the legality of the rates set up will have no effect upon either the current prices paid by customers or those which have been paid since September 1, 1934. It will, however, determine the ownership of more than \$8,000,000 impounded under the restraining order. If the rates fixed for the year beginning September 1, 1933, are finally determined to be confiscatory, the money will belong to the companies; if sustained, it will belong to the consumers. As in the *Lindheimer* case [*Lindheimer v. Ill. Bell Tel. Co.*, 292 U. S. 151], time has now elapsed so realities may replace conjectures and estimates, or at least may be used to check conjectures and estimates.¹⁰

This thoroughly just result makes doubly significant the close factual resemblances in the problems presented in that case and on the present appeal. In the first place, the statute¹¹ authorizing

¹⁰ It may be noted that the Secretary's order of August 26, 1938, appointed an Examiner, *inter alia*, to take evidence concerning changed conditions. See Appendix B, *infra*, p. 100.

¹¹ Laws of 1910, Ch. 480, as amended by L. 1934, Ch. 212, April 13; Cahill's Consolidated Laws of New York, Ch. 49, Section 72.

the New York Commission to initiate proceedings relating to an order fixing the price of gas or electricity provides:

* * * *After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners, or inspectors, the commission may, by order, fix just and reasonable prices, rates, and charges* * * * [*Italics added.*]

Here, as in section 310 of the Packers and Stockyards Act, the details of the procedural section could have been magnified into an instrument for defeating substantive justice. The court, however, wisely concentrated on its equitable duties with respect to the impounded fund. In the second place, the restraining order was conditioned in the following manner—"if the Appellate Division upon final determination of the certiorari proceeding affirms the determinations and orders of the Commission, petitioners shall repay to their consumers * * * the difference between the rates and charges required by said orders and the rates required by the present schedules * * *" (270 N. Y. S. at 417). Or, as the Appellate Division characterized it, the impounded money was to be refunded to the consumers "in the event the orders of the commission should be sustained." It will be recalled that in the present case impounding was ordered "pending final disposition of this cause." Clearly in the *New York Edison Co.* case the electric companies were in a position to contend, in view of the language of

the restraining order, that the impounded fund belonged to them by force alone of the decree of the Appellate Division, just as appellees here argue. But the Appellate Division recognized that the setting aside of the temporary rate orders had no effect at all on the substantive question which the case presented, namely, whether or not the rate which had produced the impounded fund was a reasonable rate. It therefore recognized the unvarying duty of a court of equity to mold and condition its decrees to accomplish justice.

Similarly, in the *Brooklyn Union Gas Co.* case a large sum of money was impounded under a restraining order which suspended the operation of temporary emergency rates, and when the Third Department of the Appellate Division set the rate orders aside the Gas Company claimed the right to immediate restitution of the impounded fund. But in answer to this claim the court said (281 N. Y. S. at 235):

The court chooses to direct a new hearing herein on the merits on the theory that the commission began this rate proceeding under statutory authority; that its *ultra vires* acts in assuming to legislate that an emergency existed, and the other prejudicial errors of law, were mistakes of procedure. The ownership of a large sum of money earmarked under the provisions of the March 14, 1934, order must be determined.

In this instance the court recognized that difficulties might be encountered in attempting to fix rates

for a definite period of one year apart from a proceeding incidental to the fixing of permanent rates, and said that if those difficulties were insurmountable the commission or the courts might dismiss the proceeding later. But the court was not willing to permit its invalidation of the orders for procedural errors to have the automatic effect of giving the Gas Company the impounded fund.

D. THIS COURT HAS PROTECTED SUBSTANTIVE JUSTICE IN CORRECTING PROCEDURAL IRREGULARITIES ON COLLATERAL REVIEW

The New York cases, discussed in the preceding section, typify the manner in which equitable principles and administrative justice can unite to preserve both procedural and substantive rights. We recognize, however, that they arose on direct review of the administrative tribunal. The mechanics by which the cause is returned to the administrative agency to correct its error are simpler when the mandate runs to the agency itself than when the judicial review takes the collateral form of a suit for an injunction. But this distinction is more superficial than real. By molding its decree to fit the needs of the case, the equity court has the same power to do justice when review is by suit for an injunction as when process runs directly to the administrative agency.

It is, however, unnecessary to speculate as to the capacity of courts on collateral review to reach such a situation. For in two immigration cases

this Court on collateral review of administrative action has entered orders which in every basic feature seem precisely analogous to that appellants seek here.

Mahler v. Eby, 264 U. S. 32, was a *habeas corpus* case involving certain aliens who were being held for deportation. They had been convicted of crime and the Secretary of Labor, after a hearing, had ordered them deported. The statute under which the Secretary acted authorized him to order deportation of persons found by him to be "undesirable residents of the United States." The warrants of deportation which the Secretary issued did not contain such a finding—in other words, as in the *Atlantic Coast Line* case, the orders did not show the finding of fact necessary to support the statutory authority to act. For that reason, this Court held the warrants of deportation void. Upon reaching that point the Court had fully protected the alien's procedural rights; the Court had said the warrants were invalid and that relators could not be deported under them. But there were other rights involved, the rights of the government and of the citizens. Accordingly, this Court said the law did not require that relators be released because a procedural error had been committed. The Court held that relators should be detained for a reasonable time until the Secretary of Labor could "correct and perfect his findings" (264 U. S. at p. 46). It is true the Court referred to Section 761

of the Revised Statutes as supporting its conclusion; but that section gives nothing beyond this Court's equity powers, for it merely authorizes the Court in a *habeas corpus* case "to dispose of the party as the law and justice require." The Secretary of Labor in the *Mahler* case was thus permitted to cure the defect in his deportation order by reopening the proceeding and making the findings which he had failed before to make. The Court recognized that to be deported only under a valid warrant was relators' statutory right but that to be freed because the Secretary of Labor had made a procedural error was more than they could demand.

In *Tod v. Waldman*, 266 U. S. 113, a situation more closely comparable to that at bar was presented. Mrs. Waldman and her three minor children, all immigrants, were ordered deported on the ground, among others, that she was illiterate and likely to become a public charge. They sued out a writ of *habeas corpus*. The District Court dismissed the writ, but the Circuit Court of Appeals reversed on the ground that Mrs. Waldman had been denied a fair hearing before the immigration authorities, particularly in that she had been deprived of the statutory right of appeal to the Secretary of Labor. The Court of Appeals directed the District Court to grant the writ and to discharge the relators from custody. 289 Fed.

761 (C. C. A. 2d). On petition for rehearing the Court of Appeals said (p. 767):

If, as here, we find the proceeding was not in accordance with the law, the result is that the relator is discharged from custody.

This Court reversed. It held that by being deprived of the right to appeal to the Secretary of Labor, Mrs. Waldman and her children had been denied the full and fair hearing guaranteed by the statute, but that (266 U. S. at 118):

This denial of appeal did not give them a right of admission to the country.

Government counsel in that case, apparently unaware of *Mahler v. Eby*, urged only that the cause should be remanded to the District Court for a fair hearing on the question of admission to the country. The Court, however, ordered relators held for thirty days after the issuance of the mandate "to await the hearing on the appeal before the Secretary of Labor" and provided for their discharge if the Secretary did not act within the time limited. This action was taken because the Court decided that the issues could better be determined before the Secretary of Labor.¹² It said (p. 119):

¹² So, in the case at bar, the best way to assure protection of all the rights involved is to maintain the *status quo* as to the impounded fund until the Secretary has awarded appellees the rights to which they are entitled and then to dispose of the fund on the basis of the reconsidered order. Unquestionably an administrative determination of reasonable rates and charges is preferable because it is simpler, be-

Without saying that the circumstances might not arise which would justify such a variation in the order from that which we now direct, we do not think that the course

cause it calls for the exercise of expert knowledge in limited fields, and because Congress so intended it. The excerpt quoted above adequately expresses this Court's view in this respect.

But if this Court holds that administrative determination is impossible now because the Packers and Stockyards Act prohibits the Secretary from resuming this proceeding, the problem presented by this appeal is still unanswered. We have shown that nothing which appeared in the record up to the time this Court last spoke in this case had any determinative effect on the disposition of the impounded fund. We have shown that the reversal of the District Court's decree and the invalidation of the Secretary's order had no such effect. And obviously nothing has since been done in or by the District Court which has any bearing on the questions involved in the proper distribution of the impounded fund. The District Court has in its custody a fund collected by one group upon behalf of another and nothing which it has done or decided in the case has been directed toward ascertaining title thereto. Should the Court decide that administrative determination of the questions here presented is unavailable, it would then be necessary to provide for judicial determination of the ownership of the fund according to equitable principles, as in an equity proceeding conducted after entry of judgment (*B. & O. R. Co. v. United States*, 279 U. S. 781, 785). This course might involve, procedurally, referring the cause to a master or hearing the case in open court or on depositions; the method is immaterial. It would involve, in principle, a consideration of the complex problems affecting rate structures and a final decision as to what rates appellees should have charged their patrons during this litigation and up to November 1, 1937. When the court decides what were reasonable rates during that period it would know upon what basis the impounded fund should be distributed.

taken in the cases cited should guide us here. In those cases the single question was whether the petitioner was a citizen of the United States before he sought admission, a question of frequent judicial inquiry. Here the questions are technical ones involving the educational qualifications of an immigrant in a language foreign to ours, and the medical inquiry as to effect of a physical defect on the probability of a child's being able to earn a living or of becoming a public charge. The court is not as well qualified in such cases to consider and decide the issues as the immigration authorities. The statute intends that such questions shall be considered and determined by the immigration authorities. It would seem better to remand the relators to the hearing of the appeal, by the Secretary and his assistants, who have constant practice and are better advised in deciding such questions.

The *Waldman* case has particularly pertinent application here. The procedural defects in that case and this are the same—defects arising from the denial of a full hearing at some stage in the proceedings. The Court of Appeals in that case took a very narrow view of its duties and powers and felt compelled to discharge the relators once it found denial of a full hearing. Such a holding obviously proceeded from a misconception of the relation between the rights involved. To argue that because Mrs. Waldman had been denied a fair hearing she therefore was entitled to be admitted

to the country was to argue that because procedural rights had been denied therefore substantive rights were determined. To have sustained the Court of Appeals, apart from the fact that its order discharging relators would not prejudice further deportation proceedings, would have meant holding that Mrs. Waldman acquired a substantive right by being denied a procedural right. Similarly to sustain the District Court in this case would mean either that the denial of appellees' procedural right established the reasonableness of the rates they were charging or that, because they were denied a procedural right, they are licensed to charge those rates whether reasonable or not.

Review by *habeas corpus* is substantially indistinguishable from review by injunction in cases involving administrative action; if anything, the equitable process has a greater flexibility. If this were a case of a direct petition for review, as is the case with many of the federal administrative tribunals, there would be no doubt of the Court's power to remand the proceeding to the Secretary of Agriculture for correction of procedural errors and of the order involved. The fact that in the deportation cases review was indirect, by way of *habeas corpus*, rather than direct did not prevent this Court from reaching the result appellants contend for here. In those cases the Secretary of Labor was recognized as having the power to reopen the proceedings, correct his errors, and to reconsider his defective orders; so that this power

might be effectively exercised the Court ordered the *status quo* to be maintained pending his action. The Court there had no power to remand; it accomplished the result simply by conditioning the decree which it entered.

A court of equity in setting aside the procedurally defective order of the Secretary of Agriculture is under a correspondingly clear obligation so to condition its decree that no inequity be done. Such a disposition would seem to follow *a fortiori* on the authority of *Mahler v. Eby* and *Tod v. Waldman*. Deportation, as this Court said in *Ng Fung Ho v. White*, 259 U. S. 276, "may result in loss of both property and life; or of all that makes life worth living." Relators in the *Waldman* case, for example, had fled religious persecution in Russia and feared that if deported they would be in danger of death (289 Fed. at p. 762). Yet, even when this compelling interest was measured against the rather intangible interest of citizens generally in having the immigration laws enforced, the Court directed that the *status quo* be maintained until there could be a proper disposition of the case on the merits. The relators were thereby kept in custody, notwithstanding the judgment in habeas corpus would not have been *res judicata* if they had been released and the immigration authorities had commenced proceedings anew. The continued custody served merely to eliminate the possibility that the relators could not again be apprehended.

The deportation cases thus serve pointedly to illustrate that there is ample basis in authority for the protection of the farmers' substantive rights under the Packers and Stockyards Act. We have shown both that these rights cannot adequately be protected save in this proceeding and that nothing previously done in this case has foreclosed their protection. Furthermore, persuasive authorities furnish the guideposts leading to the result in law which the facts and equities of this case compel. *Atlantic Coast Line v. Florida*, though different from this case in its procedural aspects, teaches the fundamental principle of justice and equity upon which our arguments are based—that a court may so mold its action that rights of procedure will be protected without conferring immunity from substantive obligations. The New York cases demonstrate that a court having the power to remand will exercise that power to reach a result harmonious with justice. In *Mahler v. Eby* and *Tod v. Waldman* this Court made clear the self-evident truth that the vindication of procedural safeguards need not foreclose the determination of substantive obligations. By the simple expedient of conditioning its decree this Court may here, as it did in the deportation cases, strike a proper balance between the coordinate rights of procedure and substance to attain the only result consistent with judicial and administrative justice.

APPELLEES' OBJECTIONS TO FURTHER PROCEEDINGS BY THE SECRETARY ARE UNSOUND

With much that we have said appellees, at least to date, have not taken direct issue. They have, instead, emphasized three arguments upon which they chiefly ground their claim that immediate distribution of the impounded funds must be made to them. Each argument is unsound.

1. *The Secretary's order will not be retroactive.*—Appellees insist that the Secretary of Agriculture has no power to make a retroactive rate order, and that the order to be made in further proceedings before the Secretary must necessarily be retroactive because it will fix rates for a period between June 14, 1933, and November 1, 1937. This argument is built about the provision in Section 310 of the Packers and Stockyards Act that "after a full hearing * * * the Secretary—(a) May determine and prescribe what will be the just and reasonable rate or charge, * * * to be thereafter observed * * *." It follows, appellees insist, that since there has not yet been a full hearing, the Secretary in the further proceedings before him cannot prescribe rates to be observed in the past.

a. In any proper sense the reconsidered order of the Secretary will not be retroactive. The District Court, if it finds that the Secretary has properly entered a valid order in the further proceedings, will direct distribution of the impounded fund on

the basis of that order. The retrospective effect of the order in such event will be precisely what it would have been if after five years of litigation the Secretary's order had been sustained and the District Court had distributed the impounded fund to the farmers. In either case, the effect is to reach back in time to place the parties where they should have been from the beginning. The ultimate practical effect of the order will be to determine rights to money in escrow—money not owned by appellees, as they claim, but money deposited in court by appellees upon behalf of the farmers from whom they collected it. The reconsideration of the original order will thus make possible the proper distribution of a fund which came into existence only because of the original rate proceeding and which cannot justly be disposed of until that proceeding has been terminated on the merits.

b. Appellees' argument, in short, mistakes the character of a "retroactive" order. Such an order, of course, is one which imposes liability without notice for conduct which has already occurred. If there be notice of the rule before the transactions take place, the liability cannot be escaped by attacking the rule as retroactive. Thus, past transactions may be taxed if the taxpayer at the time knew he was subject to some tax.¹³ *Milliken v.*

¹³ For this reason, and perhaps for the additional reason that the ordinary man would not have been deterred from entering a profitable transaction because of a foreknowledge that the net income would be taxed, the retroactivity of

United States, 283 U. S. 15; *United States v. Hudson*, 299 U. S. 498, 501. Similarly, acts of executive officers which may have been invalid because of an improper delegation of legislative authority may, after the event, be validated by legislative ratification. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-302, and cases cited. The ground of these decisions is that none can complain of surprise or oppression if, having notice of the rule of conduct, the defects in the prescription of the rule are cured after the transaction has occurred. True, there has been a retroactive removal of a ground upon which the rule might be challenged, but of this none can complain. As this Court said in *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-430:

* * * a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Govern-

income taxes have uniformly been sustained. *Stockdale v. Insurance Cos.*, 20 Wall. 323, 331-332, 341; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 20; *Lynch v. Hornby*, 247 U. S. 339, 343; *Cooper v. United States*, 280 U. S. 409.

ment, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. "The power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Charlotte Harbor & Northern Railway Company v. Welles, supra.* * * *

Those principles are fully applicable here, where there have been "mistakes and defects in the administration of government," and where they may be cured after the event in order "that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." In the ratification cases, only Congress could supply the cure, but here the Secretary of Agriculture himself can right the wrong. In neither case is there any forbidden retroactivity.

c. The dispute between the parties turns largely upon terminology. If the further proceeding before the Secretary is viewed as a *new* rate proceeding, Section 310 of course prevents the order which is to be entered from having any effect upon prior transactions. But this view cannot be accepted. The further proceedings are merely ancillary to the initial proceedings and to this Court's invalidation of the order, and are designed to determine whether, or the extent to which, appellees were prejudiced by the procedural error.

The Secretary's order was held invalid because of the failure to serve a tentative report or sufficiently to define the issues to which the appellees' argument and objections could be addressed. Since the Court did not examine the merits, it cannot at this juncture be known whether or not the appellees were in fact prejudiced by this procedural defect. Prejudiced they certainly were, in the sense that the order could not be known to be correct until tested by a determination made under correct procedure. But, as we have earlier shown, the ultimate question is whether the Secretary's order correctly defines the substantive duty laid upon appellees by Section 305. If it does, the failure to accord them what this Court has defined as an essential part of a full hearing resulted in no substantive prejudice.

The further proceedings before the Secretary will permit an even fuller exploration of the substantive questions involved than occurred on the first hearing, for the appellees will have ample opportunity to direct their arguments to specific findings. The Secretary, accordingly, will have before him everything which permits determination of the substantive issues of the case. His amended findings and order will serve to show whether, or to what extent, appellees were prejudiced by the invalidity of the initial proceeding. This determination will be subject to review by the courts. When a final answer has been reached on the merits, and only

then, will the extent of the substantive prejudice to appellees be known.

The question is basically identical to that presented whenever the appellate court considers what action it should take because of the procedural error of a lower court. If the error is plainly nonprejudicial and inconsequential to the decision on the merits, the court, of course, will not reverse. Judicial Code, Section 269 (U. S. C., Title 28, Sec. 391). But if the error is of a serious character, as here, the appellate court will not speculate as to the extent to which it influenced the decision on the merits. Without considering whether, in the final analysis, the actual judgment below was right or wrong, the case will be sent back for further proceedings under a correct procedure.¹⁴ Only when measured by this pragmatic test can the extent of prejudice from the procedural error be measured.

The principle is peculiarly applicable to proceedings before an administrative tribunal. This Court, it is conceivable, could have examined the merits on the prior appeal of this case. But, since it looks only to see if there was evidence to support the Secretary's order, it could not accurately tell whether or to what extent the Secretary's order was influenced by his procedural error. This

¹⁴ Even if called a "new trial," the further proceedings are not subject to the disabilities attending a suit instituted after the remand. If the statute of limitations had run, for example, during the original action, the new trial after reversal would not be barred.

Court properly, therefore, declined to consider the merits. The further consideration of the Secretary, under a correct procedure, will show the precise amount of prejudice resulting from the earlier procedural error. Viewed in this light, the Secretary's further action cannot at all be considered a new rate proceeding. It is merely a continuation of the old proceeding, in order to make an inquiry which is ancillary to the procedural decision of this Court. Thus, a form of a full hearing in intended compliance with Section 310 has already been had. True, it was an erroneous form. The further proceedings will demonstrate whether or to what extent this error influenced the final result. But this inquiry is quite plainly not the *initiation* of a rate proceeding, and Section 310 contains no bar to the determination of the ownership of the impounded funds on the basis of the reconsidered order.

d. Finally, it should be noted that this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301, gave a retroactive force to the second order of the Commission. The section under which the Interstate Commerce Commission acted contained provisions identical, in this respect, to the statute at bar.¹⁵

¹⁵ Section 13 (4) of the Interstate Commerce Act (c. 104, 24 Stat. 383, as amended; U. S. C., Title 49, Sec. 13 (4)) provides that "the commission, *after full hearing*, * * * shall prescribe the rate * * * *thereafter to be observed*, in such manner as * * * will remove such * * * discrimination." [Italics added.]

This Court recognized that "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past" (p. 311), but found in that provision no bar to recognizing the basic mandate of the statute forbidding unjust discrimination against interstate commerce, and no prohibition against curing an order which was invalid because of procedural defects.¹⁶

2. *The terms of the impounding order do not compel immediate distribution.*—Appellees make a further argument for immediate distribution of the funds which is based upon the provision of the impounding order (R. 130) that the funds shall be held "pending final disposition of this cause." We think it clear that this argument cannot be accepted.

In the first place, if the Secretary is empowered to correct the procedural error, there can be no final disposition of the cause until this has been done. Further proceedings before him are in continuation of the same proceeding, and are not the institution of a new rate proceeding. In consequence, there has not yet been any final disposition of the cause.

¹⁶ Similarly, as we have pointed out above (*supra*, p. 50), the New York statute which gave rise to *New York Edison Co. v. Maltbie*, 244 App. Div. 436, 279 N. Y. S. 919, and *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. 74, 281 N. Y. S. 233, contained provisions not substantially different from those here involved, and yet the court found no obstacle to granting substantially the same relief as here asked.

Moreover, the order provides (R. 130) that the amounts deposited shall be accompanied by "a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner." This plainly has reference to the farmers, and their equitable title or claim cannot be swept away so long as there is no judicial decision that the Secretary was wrong in determining that appellees' rates were unreasonable and that the rates prescribed by the order of June 14, 1933, were reasonable and just. Until that determination should be proved wrong, the impounded funds remain moneys collected "on behalf" of the farmers.

Indeed, appellees' argument as to the precise connotations of the words of the impounding order would seem beside the point. The question is not the construction of a contract between business men but the construction of an order of a court of equity, entered in the course of administering a regulatory statute of Congress. If that statute contemplates, as it plainly does, that substantive justice should be done, a court of equity must be taken to have framed its decree in a manner designed to accomplish the statutory purpose. Any ambiguity must therefore be resolved in a way to protect and not to defeat the substantive rights of the parties.¹⁷

¹⁷ It is for this reason that we attach no significance to appellees' suggestion that the District Court could have entered a restraining order without any impounding provision what-

3. *The distinction between procedural and substantive error.*—Appellees have suggested that our basic premise, that substantive rights should not be concluded by procedural error, is mistaken because there is no distinction between procedural and substantive error.

The suggestion is contradicted by the legal thought of many centuries. The “merits” of any litigation is the issue which provoked the proceedings; the “procedure” is the mechanism by which the issue is reached and decided. This basic postulate is equally applicable to judicial review of administrative agencies, even though the review be by injunction. The ultimate issue before the reviewing court may well be only whether or not the Secretary has acted arbitrarily. But the action may be taken to be arbitrary either because of mistakes of substance, as to what are just and reasonable rates, or because of mistakes of procedure, as to what constitutes a full hearing. It is our contention that, until decision is reached as to the Secretary’s action in prescribing the challenged rates, no decision as to his action in defining the

ever. This undoubtedly lies within its general equity powers, just as does its power to deny the restraining order entirely. See Section 316 of the Packers and Stockyards Act and Section 208 of the Judicial Code (U. S. C., Title 28, Sec. 46). But any suggestion that the Court enjoin enforcement of the Secretary’s order during the course of the litigation, without provision for impounding, would undoubtedly be rejected out of hand as calling for an abuse of the Court’s powers.

procedure contemplated by the statute should conclude the cause.

There is no occasion to elaborate upon this most rudimentary of legal distinctions. The Court itself, in *Atlantic Coast Line v. Florida*, 295 U. S. 301, has removed the matter from controversy. There the failure of the Interstate Commerce Commission to make the requisite findings of fact was, under an identical system of judicial review, described as a defect in form (p. 311), a slip of procedure (p. 312), a part of procedural entanglements (p. 313), a blunder of procedure (p. 315), and as a procedural mistake (p. 316).

As has been shown, the initial question is whether the procedural error has prejudiced the substantive result; even where it probably has, the Secretary clearly has power to correct the error (*supra*, pp. 64-67). We believe, moreover, that a procedure similar to that for which we now contend would be equally applicable to errors of substance, so long as they were of such a character that the order of the Secretary might yet be corrected, such as error in the admission or rejection of evidence.

F. SOUND GOVERNMENT REQUIRES THAT COURTS AND ADMINISTRATIVE AGENCIES COOPERATE TO SECURE BOTH PROCEDURAL AND SUBSTANTIVE RIGHTS

No discussion of the issues presented by this case would be complete without explicitly directing attention to the broader issues of administrative law and governmental operation which may hinge upon or be affected by the decision here. That decision,

it seems clear enough, will be one of importance both to the federal administrative agencies and to the federal courts.

The importance to the administrative tribunals, or at least to those which are subject to collateral rather than direct judicial review, is plain. Any rule which extended immunity from regulation, if only the administrative agency could be convicted of procedural error, would immeasurably increase its burdens. Few persons against whom administrative proceedings are instituted are anxious to submit to regulation. If appellees' position were sustained by this Court, the result could only be to offer a high reward for dilatory tactics, procedural entanglements, and a continuing recalcitrance toward the administrative process. The administrative tribunal would often be forced to accede to the most far-fetched demand of ingenious counsel, for fear of the possibility, however remote, that if the request were denied the whole fruit of the proceeding might be lost, perhaps years later, because the courts would view the demand as justified. The administrative agency might properly feel that the procedure suggested by counsel was patently unsound; but, in the present uncrystallized state of administrative procedure, it would require a bold tribunal to be willing to risk the substantive results of the proceeding upon any procedural point.

We cannot emphasize too strongly that we have no disposition in any manner to weaken the pro-

cedural safeguards of persons appearing in administrative hearings. The increased particularity of the more recent decisions of this Court, for example, we welcome as a salutary influence in formulating the standards of administrative procedure. But we wish, with equal emphasis, to suggest that this guidance can be given without disruption of the administrative process. The administrative tribunal, as the inferior court, may often make mistakes. But it, equally with the court, is anxious to correct its errors and to do justice. It is entitled to the same consideration, and to the same opportunity to correct procedural error without prejudice to the substantive ends of the proceeding, as is the inferior court.

A proper development of administrative procedure requires that too heavy a penalty not be placed upon procedural error. Administrative agencies will hesitate to adopt procedural standards, and courts will be reluctant to formulate canons of procedure, if the price of departure will be a sacrifice of the substantive end of the proceeding. Only when procedural safeguards and substantive rights are viewed as wholly consistent each with the other can either develop properly.

It may be, if the courts' supervision of administrative procedure should impose obstacles too serious for effective administration, that Congress can provide the remedy. This is not a solution to be welcomed. The problems of a just and effective

procedure are too numerous and too varied effectively to be handled by legislation. Of this the history of judicial procedure provides ample documentation. For almost a century the amelioration of the common law procedure has been sought by means of statute. The civil codes, however, have become notoriously complicated and inflexible. The whole thought of the present generation, as notably exemplified by the Federal Rules of Civil Procedure, is to leave to the courts the means by which to work out the procedural problems which harass the course of justice. The flexibility and adaptability which arise in this manner are especially necessary with respect to the review of an administrative tribunal, where the procedure must be less formalized than in judicial proceedings. There would be a serious retrogression if, in place of the broad provisions for procedure and judicial review, Congress were forced by too harsh an attitude on the part of the courts minutely to prescribe the character of procedure for the administrative tribunals and the consequences of departure therefrom.

This, in turn, suggests the importance to the courts themselves that the administrative tribunal be given an opportunity to correct its mistakes of procedure. The administrative agency is already a permanent part of contemporary government. The work of the federal courts must increasingly be concerned with matters which originate before an

administrative tribunal. This aspect of the governmental process is necessarily a cooperative undertaking of the courts and the administrative agency. It can successfully be performed only in a spirit of cooperation. If the courts were to regard the administrative agency as deserving of discipline rather than assistance, if the administrative agency were to regard the courts as intermeddlers seeking to frustrate the administrative process, an intolerable situation would shortly grow up. The specialized competence of the administrative tribunal offers great assistance to the judicial process; the broad background of judicial experience offers an invaluable guide to the administrative determination. See Landis, *Administrative Policies and the Courts*, 47 Yale Law J. 519. Those benefits might largely be lost if the court and the administrative agency were to regard each other as things apart. And we can think of few decisions which would do more to destroy the indispensable cooperative assistance of the courts and the administrative tribunals than would an acceptance of appellees' position. No administrative agency could welcome judicial review if it, in contrast to an inferior court, was to be penalized for a procedural error by an irretrievable reversal on the merits as well.

These considerations become doubly compelling when it is considered that Congress has, in Section

305 of the Packers and Stockyards Act, affirmatively declared that all rates shall be just, reasonable, and nondiscriminatory. Unless there be error in the Secretary's determination, this Court should not extend appellees the substantive immunity which they seek. Neither the statute nor good government contemplates ends so divergent between the courts and the Secretary. We cannot state our position half so well as was done by the Court itself in *Atlantic Coast Line v. Florida*, 295 U. S. 301, 312, 314, 316:

Unjust discrimination * * * does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. * * * To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. * * * A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision and order of the court below should be reversed and the cause remanded with directions to the District Court to hold the impounded funds until the Secretary of Agriculture shall have concluded the further proceedings

before him and have determined a rate which should govern the distribution of the funds.

✓ ROBERT H. JACKSON,

Solicitor General.

✓ THURMAN ARNOLD,

Assistant Attorney General.

✓ WENDELL BERGE,

✓ M. S. HUBERMAN,

BRUNSON MACCHESNEY,

Special Assistants to the Attorney General.

✓ WARNER W. GARDNER,

SMITH K. BRITTINGHAM, Jr.,

Special Attorneys.

OCTOBER 1938.

APPENDIX A

PACKERS AND STOCKYARDS ACT OF 1921, AS AMENDED (7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159, et seq.)

TITLE III—STOCKYARDS

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep,

swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

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SEC. 304.¹ It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at

¹Amended by an act of Congress approved May 5, 1926.

such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge,

the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and, pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or

different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of

the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done, he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of

in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates

or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and that regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice

thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or

restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE SECRETARY OF AGRICULTURE

Bureau of Animal Industry Docket No. 311

SECRETARY OF AGRICULTURE

v.

B. ANDREWS ET AL., RE-
SPONDENTS

Opinion on Motions

I have given careful consideration to the several motions filed by the respondents in the above-entitled cause. My conclusions with reference to the disposition of the motions are set forth below.

(1) On April 25, 1938, the Supreme Court found that the proceedings which terminated in my order of June 14, 1933, fixing reasonable rates and charges, were fatally defective because the proposed findings had not been made available to respondents at any time prior to the final argument. In an effort to correct this defect, I entered an order on June 2, 1938, reopening the proceeding and directed that "the Proceedings, Findings of fact, Conclusion and Order" as issued by me on June 14, 1933, be served upon respondents as the tentative findings of fact, conclusion and order in this proceeding, and directed that respondents be given 30 days in which to file exceptions to the tentative finding of fact, tentative conclusion and proposed order and in which to make any appropriate motions or objections with respect to fur-

ther proceedings in this case. At respondent's request this time was subsequently extended to August 15, 1938.

(2) On June 30, 1938, respondents moved to vacate the order reopening the proceeding on several grounds. It was first urged that the Packers and Stockyards Act in so far as it vested rate-making power in the Secretary of Agriculture is unconstitutional because it does not provide an impartial trier of the facts, the Secretary and other officials of the Department necessarily being partial and favorable to the owners and shippers of livestock and biased against the interests of the commission men. It was further urged that the present Secretary of Agriculture could not be an impartial trier of the facts because he had prejudged the case in favor of the shippers and that the subordinate officials in the Department were under a like disability. It was also urged that the proceeding was reopened not for the purpose of according respondents a full, fair and open hearing but for the sole purpose of validating the order of June 14, 1933, and of awarding reparation to shippers who have not petitioned therefor. And it was further urged that the manner in which the Secretary had reopened the proceeding had deprived the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933.

(3) On August 15, 1938, the respondents made a further motion to vacate the "Order Reopening Proceeding" questioning both the constitutional and statutory power of the Secretary to proceed with the hearing and questioning the propriety of

the Secretary using the tentative findings of fact, conclusion and proposed order as the basis of a further hearing in the proceeding on the ground that they were not prepared in accordance with the rules of practice of the Department. As a part of the same motion respondents moved that in the event that the "Order Reopening Proceeding" was not vacated, the tentative findings should be stricken out of the proceedings and the respondents permitted to offer to an Examiner designated by the Secretary stated evidence bearing upon the reasonableness of the rates to be fixed for the period subsequent to June 14, 1933.

(4) On August 13, 1938, the New Amsterdam Casualty Company, which has been substituted as respondent for Harry J. Kennaley, doing business as the Harry Kennaley Commission Company, moved to vacate the order of June 2, 1938, on the ground that the death of Harry J. Kennaley made it impossible to accord said Kennaley a full hearing and thus cure the prior error. By an additional motion, the New Amsterdam Casualty Company raises questions of constitutional and statutory authority similar to those raised in the above motions.

(5) Many of the issues raised by respondents' motions are of a character that may be more appropriately dealt with at the close of the hearing without prejudice to respondents' rights. A number of the issues raised have been argued in the District Court and an appeal thereon is pending in the Supreme Court. It may be doubted whether an administrative official has power to pass on some of the questions raised, particularly those of con-

stitutional authority. Certainly the issues raised by respondents are not so clear as to convince me that it would be futile to continue this proceeding. I shall, therefore, not vacate the "Order Reopening Proceeding" but shall continue the proceeding reserving to respondents the right to renew their motions at a later stage when the nature and extent of the issues have become more clearly defined.

(6) There are, however, two points raised by respondents' motions which I think I should deal with now. The first relates to the motion to disqualify me for bias and prejudice. I refer now to those parts of respondents' motion which relate to me personally, and to the affidavit of bias and prejudice filed by their counsel. I am not referring to the rather novel suggestion of respondents that the entire staff of the Department of Agriculture is disqualified from acting.

After careful and serious consideration I have determined that I should not disqualify myself as a matter of law or as a matter of expediency. I might possibly have reached a contrary conclusion as a matter of expediency, were it not for the fact that respondents in filing their exceptions to the tentative findings of fact "deny that any authority to hold hearings or determine issues as herein presented is extended by the Packers and Stockyards Act, 1921, to any person other than the Secretary of Agriculture himself." In the circumstances of this case I can not and I will not shirk the grave responsibility placed upon me by Congress to determine reasonable rates for services to farmers.

This proceeding first came before me at the very beginning of my incumbency of the post of Secretary of Agriculture. I attempted to follow the

established practice and procedure of the Department. I was new at my job but I tried to fulfill it as conscientiously as I could with the knowledge that I then had. Soon after coming into office I put into effect the practice of serving a report with opportunity to the respondents to file and be heard on exceptions to the report. Immediately after the Supreme Court in May, 1936, pointed out that it would have been better practice to submit a report to the parties and hear argument on their exceptions I adopted rules of practice specifically providing for this procedure. And I certainly never said or wrote anything which reflected upon the wisdom of the Supreme Court's suggestion.

The respondents have based their charge of bias and prejudice upon certain statements made by me shortly after the decision of the Supreme Court on the second appeal on April 25 last. And they assert those statements indicate that I have prejudged the case against them.

I deeply regret if any of my remarks taken out of their context gave them any such impression. I did criticise the opinion of the Court before I was advised of the possibility of my reopening the case and thereby avoiding the release of the impounded funds without regard to the substantive rights of the parties. But in reopening this case I shall have no power to judge or to alter the mandate of the Supreme Court. I must endeavor to conduct this proceeding in a manner consistent with the mandate of the Supreme Court and if I err, my action will be subject to correction ultimately by that Court. In criticising rightly or wrongly the opinion of the Supreme Court, I can scarcely be said to have prejudged the action that

I may take in this proceeding which, if it is to stand, must of necessity be consistent with that opinion.

I did make the statement that the effect of the Supreme Court's decision was to give to the commission men several hundred thousand dollars which rightly belonged to the farmer. I am no lawyer. I read the decision of the Supreme Court of April 25th and I thought it meant what the respondents claimed—that the impounded funds were to be released to the commission men. It seemed to me that, since the Supreme Court had expressed no opinion upon the merits, the farmers on the record had a much better claim to the impounded funds than did the commission men. However serious the defects found in the proceeding before me, the District Court which had reviewed my findings on the merits, had upheld them. In other words, I had found certain rates to be reasonable and the only court passing on their reasonableness had upheld my finding. Under those circumstances, I saw no ground for giving the impounded excess to the commission men without regard to the merits. And I think that is all that my words that the money belonged to the farmers could be interpreted to mean. I know that is all that I intended them to mean.

On the facts as I then knew them and without any further proceedings, I thought that the farmers had a better claim to the money than the commission men and that it was unfair to give the money directly to the commission men. I still think so. Again I say that that is all I intended my words to mean.

In petitioning for a rehearing before the Supreme Court, the Solicitor General took the position

that the Court had not decided but ought to decide how the excess funds should be disposed of. The Court denied the rehearing, but stated that the questions raised by the Solicitor General were appropriately for the District Court, "to which the case was remanded for further proceedings. The Supreme Court indicated that what further proceedings the Secretary may see fit to take in light of its decision and what determinations may be made by the District Court in relation to any such proceedings were matters which it (the Supreme Court) would not attempt to forecast.

These statements of the Supreme Court led me to believe that I had been too hasty in my conclusion that the effect of its decision was to turn over the impounded funds to the commission men without regard to the merits and that I was not without power to correct the procedural error of which the Court had found me guilty.

Whatever may have been my findings on the basis of the prior hearing, I see no reason why I cannot as fairly and as impartially conduct further proceedings consistent with the opinion of the Supreme Court as any other inferior court whose action has been reversed by an appellate court. I, naturally, thought my original decision was correct at the time. But I have never said or intended to say that upon a further hearing with a new procedure or with the benefit of fresh argument or new evidence I could not or would not change my findings. In view of the defect found in my previous procedure and with the knowledge that my conduct of this proceeding will be most carefully scrutinized, I have every reason to guard against any possible error of procedure or of judgment. My

concern is not to vindicate my past judgment, but to see that the substantive rights of the parties are fairly determined.

(7) There is a further point raised by the respondents' motions which I think I ought to deal with now. The respondents contend that the tentative findings should be withdrawn because they are predicated wholly upon a stale record and that I should designate an examiner to hear stated evidence bearing upon the reasonableness of the rates to be fixed for the period subsequent to June 14, 1933. In support of their contention, counsel for respondents has filed an affidavit as to changed conditions since the date of that order.

The tentative findings were adopted by me after a careful study of the record and I think that at this stage the proceeding will be expedited by a consideration of these findings in light of the exceptions to them which the respondents have already filed. The findings show respondents' operations for the period just prior to the order of June 14, 1933, and will, I believe, prove very helpful as a working basis for this hearing.

On the other hand, I have never had any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933. In reopening the proceeding, I expressly gave them time in which to make any appropriate motions or objections with respect to further proceedings in this case. At the prior hearing we were obliged to consider forecasts of conditions which can now be checked in light of subsequent events. I shall accordingly designate an examiner to hear such

further evidence as he may find material and relevant in regard to conditions subsequent to June 14, 1933, which affect the reasonableness of the rates to be fixed by the Secretary. The examiner will consider the tentative findings in light of the exceptions taken thereto and the new evidence adduced, and may revise such findings or substitute or add such new findings as he may find necessary or appropriate. What weight will be given to the new evidence, and what to the old, must be determined as the hearing progresses. The respondents will be given an opportunity to make exceptions to such revised and new findings as the examiner may make before I hear final arguments on the case.

In accordance with the views herein expressed, an examiner will be appointed for the purpose of allowing the respondents opportunity to submit such additional relevant and material data as they may desire with reference to conditions subsequent to June 14, 1933.

The respondents may file exceptions to any part of this opinion within 30 days so that any considerations overlooked by me may be brought to my attention before final decision of the cause.

(Signed) H. A. WALLACE,
Secretary of Agriculture.

AUGUST 26, 1938.

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE
Bureau of Animal Industry
Docket No. 311

SECRETARY OF AGRICULTURE

v.

L. B. ANDREWS, DOING BUSINESS
AS L. B. ANDREWS LIVESTOCK
COMMISSION COMPANY, ET AL.,
MARKET AGENCIES, DOING BUS-
INESS AT THE KANSAS CITY
STOCKYARD, KANSAS CITY, MIS-
SOURI, RESPONDENTS

Order for Taking
Additional Evi-
dence

WHEREAS, respondents, on August 15, 1938, filed a motion in the above-entitled cause praying that the Secretary of Agriculture designate an examiner to hear evidence which respondents desire the opportunity to offer through the testimony of witnesses, and by other proper means;

IT IS THEREFORE ORDERED that John C. Brooke Esq., be and he is hereby designated as examiner for the purpose of taking such additional relevant and material evidence as the parties in this proceeding may desire to offer with respect to conditions subsequent to June 14, 1933;

AND IT IS FURTHER ORDERED that before the taking of such evidence the examiner shall hear the parties with respect to the exceptions filed by them to

the tentative findings of fact served in accordance with the order of the Secretary of June 2, 1938;

AND IT IS FURTHER ORDERED that after hearing argument and the additional evidence the examiner shall prepare and submit to the parties a report in accordance with the rules of practice promulgated by the Secretary of Agriculture governing proceedings under the Packers and Stockyards Act, 1921, as amended;

AND IT IS FURTHER ORDERED that said hearing shall begin at ten o'clock a. m. ~~on~~ September 12, 1938, in Room 201, Administration Building, United States Department of Agriculture, Washington, D. C., and at such other times and places as the examiner may direct;

AND IT IS FURTHER ORDERED that a copy of this order be served upon the parties by registered mail.

IN WITNESS WHEREOF, the Secretary of Agriculture has signed this order and caused the official seal of the Department of Agriculture to be affixed hereto in the City of Washington, District of Columbia, this 26th day of August 1938.

(Signed) H. A. WALLACE,
Secretary of Agriculture.





In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY
OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND
THE SECRETARY OF AGRICULTURE

I

The Court has considerably clarified the guiding principles of judicial review of administrative action since the first argument of the questions presented in this case. In these decisions we find both specific support for many of our detailed contentions and an authoritative bulwark for our earnest plea that sound government requires cooperation

(1)

rather than conflict between the courts and administrative agencies.

1. *The Substantive Rights of the Farmers Should Be Protected.*—In our main brief (pp. 18-23, 71-76) we urged that Section 305 of the Packers and Stockyards Act gave the farmers a substantive right to be charged only reasonable rates, and that the procedural sections were left extremely general in order that there might be the most flexible and effective adaptation to this end which would be possible. This argument requires, in other words, that the procedural safeguards be construed to harmonize with and not to override the basic policy of the statute. In *Keifer and Keifer v. Reconstruction Finance Corporation*, No. 364, this Term, the Court held a government corporation liable to suit, although there was no express consent, in largest part because the customary policy of Congress in creating similar corporations was to deny immunity. "The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute * * * but in a series of statutes * * *." It seems improbable that this salutary canon of statutory construction could be of such halting application that it must be abandoned when the Court is urged to construe Section 310 in the light of the cornerstone of the very Act in question.

2. *Further Proceedings Before the Administrative Body are Appropriate Means to Correct Pro-*

cedural Error.—The main brief for the appellants urges that the appropriate means by which to correct a procedural error such as that here involved is to permit further proceedings before the administrative body (pp. 32–60). Except for possible distinctions between direct and collateral review, this principle is now settled by *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364. There, because of a fear that the decision of this Court in *Morgan v. United States*, 304 U. S. 1, might have application to its administrative procedure in the *Ford Motor Co.* case, the Labor Board moved that the case be remanded from the Circuit Court of Appeals for further proceedings to correct possible errors of procedure. The lower court granted the motion and this Court affirmed. Its decision, in substance, was that such a remand would have been an appropriate consequence of a reversal because of procedural error, and that it accordingly was an appropriate order to enter on the Board's own motion. That decision governs here unless appellees can establish a controlling distinction between the statutes.

The opinion of the Court seems to make clear that the decision rested on broad foundations and went to the nature of judicial review of administrative action rather than to any particular wording of the National Labor Relations Act. It determined (pp. 373–374) that a remand for further proceedings would be an appropriate consequence of reversal for procedural error because of three considera-

tions: (a) An analogy was drawn to review of district courts; we have here drawn a comparable analogy in our main brief (pp. 33-39). (b) The Court said (p. 373):

The jurisdiction to review the orders of the National Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements. * * *

This broad ground is equally applicable to the present case. (c) Finally, the Court relied upon somewhat related decisions under the Federal Trade Commission statute. This consideration is not directly applicable to collateral review by a three judge district court. The Court, however, cited for comparison cases where new hearings had been directed after injunctions had been granted against enforcement of administrative orders on such a collateral review. So even this factor has some application in the present case.

3. *The Duty of a Court of Equity.*—In its simplest terms, our argument is that a court of equity which enters an interlocutory decree enjoining enforcement of an administrative order must use it

powers to accomplish and not to frustrate substantive justice. This duty has unequivocally been declared in *Inland Steel Co. v. United States*, No. 227, this Term.

There the Interstate Commerce Commission had directed the carrier to cease and desist from making an allowance to the shipper for spotting cars. The shipper sought review of the order, and the three-judge court entered an interlocutory injunction staying the order and suspending the revised tariff filed by the carrier "pending the further order of the court." The injunction further provided that the shipper should set up the amount of the allowances in a special account, to be paid to the carrier or canceled as the court should direct. The District Court sustained the order of the Commission and directed the allowances to be paid to the carrier; only the latter provision of the decree was challenged in the appeal to this Court, and it was affirmed. The opinion of the Court proceeds upon a broad front and is directly applicable here, since the Packers and Stockyards Act in Section 316 adopts the provisions for judicial review of the orders of the Interstate Commerce Commission.

The shipper's contention that it was entitled to retain the accumulated fund because the court lacked jurisdiction to do more than vacate the interlocutory injunction and dismiss the petition was rejected (p. 3), because it overlooked "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions

that will protect all—including the public—whose interests the injunction may affect.”

The Court set forth the duty of an equity court to condition its interlocutory relief against administrative orders, and to apply the conditions so as to ensure that the statutory purpose would be protected. Its reasoning seems to dispose of the basic problems in the present case. The Court said (p. 4):

* * * the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system. The District Court, * * * properly took steps to protect the other interests—represented by the Commission—from injuries that the injunction might cause. * * * This segregated account thus accrued as a result of judicial restraint of administrative proceedings in which the payments had been declared unlawful. When the Court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the Court promptly to allocate the fund to its lawful owner.

An Equity Court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund. Otherwise, rights

(such as the right of this Railroad to restitution) might be impaired or cut off while an interlocutory injunction is in effect, as for instance by statutes of limitations. Here, the Court had the power and it was its duty so to fashion its equitable decree that appellant should not be the beneficiary of unlawful payments, and to prevent the dissipation of the Railroad's assets through unlawful preferences.

It is true that in this case it has not yet finally been determined that the appellees have no lawful claim to the impounded fund. Whether they may lawfully claim all, or none, or some part of that fund cannot be said until the Secretary has entered an order on reconsideration¹ and until the order, if proceedings for review are brought, has been considered by the courts. But, since a court of equity must be solicitous that its processes are not used to make unlawful payments, it must be equally solicitous that they are not used irretrievably to make payments of impounded funds which may well be contrary to law. Until the Secretary, after full hearing with due expedition, determines what were the reasonable rates to be charged no final decision as to the ownership of the fund can be made. The *Inland Steel Co.* case, therefore, would

¹ For the information of the Court, the Appendix contains a letter from the Solicitor of the Department of Agriculture summarizing the course of proceedings before the Secretary since his order of June 2, 1938, reopening proceedings in this case.

seem to settle that the District Court has the duty of continuing to hold the impounded fund to await the determination of the Secretary.

It is, therefore, respectfully submitted that the recent decisions of this Court compel recognition of the guiding principles of equity jurisdiction and of sound government in the review of administrative proceedings. These principles cannot permit the appellees finally to receive moneys which have been determined to belong to the farmers not only by the Secretary in the faulty hearing but also by the District Court, which twice has found that the Secretary's findings were supported by the weight of the evidence.²

II

Appellees have filed an extended brief on reargument. Most of the arguments were presented on the first hearing of this appeal and are adequately discussed in our main brief. We shall here add only a word or two in respect to a few points which are presented in a somewhat different form than on the first argument.

1. *Case or controversy*.—On the first argument, appellees urged that this Court had no jurisdic-

² Appellees in their brief on reargument charge that we are neither frank nor fair in this statement (pp. 151-152). We are content to refer the Court to the record, either through our main brief (pp. 21-22) or through appellees' brief (pp. 6-8, 149-152), for substantiation of what we should have thought to have been clear beyond controversy.

tion of the appeal and that the court below had a mere ministerial duty to release the funds to them. This argument now reappears in the guise of the somewhat startling proposition that no case or controversy is presented to this Court (Br. 36-42). But the same decisions which show that there is jurisdiction dispose of any contention that no case or controversy is presented. *Berman v. Illinois Bell Telephone Co.*, 304 U. S. 549; *Inland Steel Co. v. United States*, No. 227, this Term.

2. *Separation of Powers.*—The Government's argument that the processes of both courts and administrative agencies should be adapted in a cooperative effort to ensure both procedural safeguards and substantive justice is vigorously attacked on the ground, *inter alia*, that this would involve disregard of the constitutional mandate that judicial and legislative or executive powers should be separately exercised (pp. 33, 69, 123-128, 131). We are more impressed by the boldness than the force of the argument, and mention it because it illustrates so well the pervading fallacy of appellees' position. Throughout their brief they assume that the Packers and Stockyards Act provides judicial review of the Secretary's orders so that he may be punished for transgression, and that the courts are cast in the role of umpires of an intricate trial by battle between the Secretary and those whom he regulates. From this view the courts in truth would seem to invade a nonjudicial field if in their decrees they

gave aid to the objectives sought by one of the contestants.

But, happily, this is not the case. Section 305 of the Packers and Stockyards Act provides that "all rates or charges * * * shall be just, reasonable, and nondiscriminatory." To implement this basic provision, Sections 310 and 316 provide for rate proceedings before the Secretary and for judicial review of his orders. Section 305 is not merely an occasion for instituting proceedings, which thereupon become ends in themselves, but is a law which binds alike the appellees, the Secretary, and the courts. All the requirements of the procedural sections must be enforced, but so, too, must the fundamental mandate of the statute. A court of equity, then, hardly can do otherwise than to mold its decrees to permit accomplishment of both procedural and substantive justice. The cooperation, as we urge, of both courts and administrative agencies to permit orderly government and the attainment of statutory purposes has to our knowledge never before been condemned as an unconstitutional intermingling of judicial and legislative or executive powers.

3. *The History of the Interstate Commerce Act.*—The appellees devote much attention to the gradual evolution of the Interstate Commerce Act (pp. 78-99). Their argument here seems to be that a number of omissions or deficiencies in procedural powers have been discovered and have subsequently been remedied by Congress; from this the conclu-

sion is drawn that any procedural defects in the Packers and Stockyards Act must await Congressional action. There is no contention that any of the omissions or defects of the Interstate Commerce Act which are discussed have pertinent relation to the procedural point now in issue. More importantly, the argument begs the very question in issue. We deny that there is any procedural defect in the Packers and Stockyards Act and insist that the broad framework of the procedural sections leaves ample room for the administrative agency and the reviewing court, armed with the powers of a court of equity, to ensure that procedural safeguards are reconciled with substantive justice.

4. *The Rate-Making Powers of the Courts.*—Appellees insist that the court below had no power to fix rates (pp. 116-123). The courts, by Section 308, are placed under a duty to enforce the substantive mandate of Section 305 that rates should be reasonable. This, of course, does not reach to the power to prescribe rates for the future. But we fail to see how retention of the impounded funds until the Secretary has reconsidered his earlier order in a full hearing has any element of rate-fixing.

5. *Abuse of Administrative Powers.*—Appellees' brief on reargument discloses perhaps more fully than before the serious implications of their position. The Secretary, they urge, should be denied all opportunity to correct procedural error because "it is idle to suggest that * * * the administrative agency will deal out even-handed justice

with an open mind" (pp. 127-128). The reconsideration of the Secretary, which we have urged would permit determination of the extent of the substantive prejudice resulting from the faulty procedure in the first hearing, "would become a hollow mockery" (p. 130). The Secretary, in future proceedings, might make a "snap order" on little or no evidence, submit to injunction by the courts, and then reissue the order (p. 153). The Secretary has a wide power to fix rates and, unless penalized for transgression of procedural requirements, will be apt to harass those whom he regulates (pp. 138-141).

We think that appellees' position can be explained or supported only upon premises such as these. We wish to protest their adoption by appellees, and to state our belief that it is unthinkable that this Court should sanction such postulates in its decision. The administrative agency has difficult and important decisions to make. It may, as may courts, make mistakes.³ But there can be no assumption that administrative agencies are not conscientious and fair minded; or that, while a court can be trusted to correct procedural error, an administrative agency cannot. If judicial review were to be based upon premises such as these, whether expressed or implicit, the result would inevitably be to encourage the growth of administra-

³ For data as to the comparative frequency of reversals by the Supreme Court of administrative agencies and of courts, see 1938 Report of the Attorney General, pp. 40-49.

ve irresponsibility and to engender an hostility
between courts and administrative agencies which
ould impair the respect due to each in its sphere.

CONCLUSION

It is therefore respectfully submitted that the
ecision of the court below should be reversed, and
at the cause should be remanded with directions
hat the impounded fund be held for distribution
s the reconsidered order of the Secretary should
ndicate, subject, of course, to the right of appellees
o seek review of this order in the three-judge court
nd in this Court.

✓ ROBERT H. JACKSON,

Solicitor General.

✓ THURMAN ARNOLD,

Assistant Attorney General.

✓ WENDELL BERGE,

BRUNSON MACCHESNEY,

Special Assistants to the Attorney General.

WARNER W. GARDNER,

SMITH R. BRITTINGHAM, Jr.,

Special Attorneys.

APRIL 1939.

APPENDIX

APRIL 11, 1939.

Hon. ROBERT H. JACKSON,

Solicitor General, Department of Justice.

DEAR MR. JACKSON:

In re: *Secretary of Agriculture v. L. B. Andrews, et al.*, Bureau of Animal Industry
Docket No. 311.

The following statement contains an outline of the Secretary's proceedings in the case referred to above, commonly known as the *Morgan* case, subsequent to the decision of the Supreme Court on April 25, 1938 (304 U. S. 1).

The Secretary issued an order on June 2, 1938, reopening the proceedings and directing that the findings of fact and order of June 14, 1933, be served on the respondents as the tentative findings of fact and order. The Secretary's order of June 2, 1938, allowed the respondents thirty days in which to file exceptions and to enter any motions which they might choose to make. At the request of the respondents, the time was subsequently extended to August 15, 1938.

On August 13, 1938, the New Amsterdam Casualty Company, which appeared specially for respondent Harry J. Kennaley, moved to vacate the order of June 2 on the ground that the death of Harry J. Kennaley made it impossible to secure a full hearing and thus cure the prior error.

On August 15, 1938, the respondents filed their exceptions to the tentative findings of fact and or-

der. At the same time, they also filed an affidavit of bias and prejudice, an affidavit as to changed conditions since the closing of the evidence, a statement objecting to the procedure and the rulings of the examiner, and further objections with respect to the Secretary's order dated June 2, 1938, reopening the proceedings.

On August 26, 1938, the Secretary rendered an opinion on two motions and reserved rulings upon all the other motions. He overruled the motion to vacate the proceedings on account of bias and prejudice. He granted the motion of the respondents requesting that the proceedings be opened for the taking of evidence as to change of conditions subsequent to June 14, 1933. The Secretary issued an order designating an examiner for the purpose of taking additional relevant and material evidence. In this order, the Secretary directed that, before the taking of such evidence, the examiner should hear the parties with respect to the exceptions filed and, after hearing argument and the additional evidence, the examiner should prepare and submit a report to the parties in accordance with the rules of practice.

Pursuant to the order of the Secretary, the examiner held a hearing, beginning on September 12, 1938, in Washington, D. C. At that time, the exceptions filed by the respondents were argued both by counsel for respondents and counsel for the Government. Following the argument, the examiner received additional evidence. An adjourned hearing was held in Kansas City, Missouri, on October 3, 1938.

After the close of the hearing, the examiner called upon counsel for the respondents and counsel

for the Government to submit to him proposed findings of fact and a proposed order. This was done.

The examiner, on January 17, 1939, issued his report to the parties, in accordance with the procedure prescribed in the "Order Promulgating Rules of Practice to Govern Proceedings Under the Packers and Stockyards Act, 1921, as amended" (Sept. 14, 1936; 1 Fed. Reg. 1362).

Counsel for the respondents filed a motion to suppress the examiner's report and grant a rehearing. By order of March 4, 1939, the Secretary of Agriculture denied this motion.

Counsel for respondents and counsel for the Government submitted their exceptions to the examiner's report and on March 29, 1939, they argued such exceptions before the Secretary of Agriculture. The Secretary now has the case under consideration.

Sincerely yours,

MASTIN G. WHITE,
Solicitor.

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**CHARLES ELMORE CROPLEY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 221

**THE UNITED STATES OF AMERICA AND THE
SECRETARY OF AGRICULTURE,**

vs.

Appellants,

**F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.**

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM.**

**FREDERICK H. WOOD,
JOHN B. GAGE,**
Counsel for Appellees.

**THOMAS T. COOKE,
CARSON E. COWHERD,**
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 221

THE UNITED STATES OF AMERICA AND THE
SECRETARY OF AGRICULTURE,

vs.

Appellants,

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN
SHEEP COMMISSION COMPANY, ET AL.,

Appellees.

**STATEMENT OF APPELLEES UNDER RULE 12, OP-
POSING JURISDICTION AND MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO AFFIRM.**

I.

Opposition to Jurisdiction and Motion to Dismiss.

Appellants seek to appeal from an order of the statutory court for the Western District of Missouri, dated June 18, 1938, which permitted appellees (commission men at the Kansas City Stockyards) to withdraw from that court some \$600,000 impounded by them¹ between June 14, 1933,² and

¹ Being the excess of the legally filed rates over the rates fixed by the Secretary of Agriculture in his order held by this Court to be invalid.

² The date of the Secretary's order reducing rates, which order was found by this Court to be invalid because a "full, fair and open" hearing had been denied.

November 1, 1937,³ as a condition of the granting to them of an order temporarily restraining the Secretary of Agriculture from putting into effect reduced commission rates and to await the result of the litigation as to their validity.

The Secretary's order fixing these reduced rates was held to be invalid by this Court in *Morgan v. United States*, No. 581, decided April 25, 1938; petition for rehearing denied May 31, 1938. It reversed the decree of the statutory court refusing an injunction and remanded the cause for proceedings in conformity with its opinion.

After finding that irreparable injury would result to the commission men unless the Secretary's order of June 14, 1933, reducing rates, should be temporarily restrained, in that, among other things, unless restrained, the Secretary of Agriculture would

"proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the schedule of rates and charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said order the petitioner would be unable to collect from the users of its services the difference between the rates fixed by the said order of the Secretary and the rates prescribed in the schedule of rates and charges now on file with the Secretary of Agriculture"

and that

"In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner,"

³ The date when, as a result of an agreement between the Secretary and appellees, new rates were substituted for the rates filed on May 11, 1932, by appellees.

the statutory court granted the temporary restraining order on July 22, 1933 (R. 127-128),⁴ before the effective date of the Secretary's order, with the following proviso:

"Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect *and pending final disposition of this cause*, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner." (Italics ours.)

After this Court held that the Secretary's order of June 14, 1933, reducing rates, was invalid, and issued its mandate reversing the statutory court's decree refusing an injunction, the statutory court denied the Government's motion to stay the distribution of the impounded funds and granted a motion of appellees that they be restored to the possession of appellees.⁵

When the statutory court refused to grant the Government's motion to stay the distribution of the impounded funds, it necessarily became incumbent upon it to grant an order for their restoration to the possession of appellees. Realizing, doubtless, the impossibility of contending that the refusal to grant the stay was an appealable "final order

⁴ This and similar references are to the record filed in this Court in *Morgan v. United States*, No. 581, October Term, 1937.

⁵ The impounded funds, of course, belonged at all times to the appellees, being merely deposited as security in the event the Secretary's order should be declared to be valid. It having been declared invalid, the only order of court necessary was one permitting the appellees to regain possession of what they already owned.

or decree," the Government appeals only from what it calls the "order of restitution." It is not such, however, because the impounded funds at all times were legally owned by appellees; and upon this Court's declaring that the Secretary's hearing was "fatally defective," and his order invalid, the right to possession of these funds automatically vested in appellees. It would clearly seem that they could have brought mandamus to compel their distribution if an order therefor had been refused. This follows from the express terms of the impounding order set forth above, which clearly contemplated that in the event the Secretary's order should be set aside (as it was), right to the possession of the funds should be vested in appellees.

It would not, however, aid appellants to assume (as would seem to be clearly contrary to fact) that the statutory court's decision to restore the impounded funds to appellees was a matter of discretion. If such a discretionary order is reviewable at all, upon appeal to this Court, it seems clear that the jurisdictional statement in accordance with Rule 12 must include "a showing of the matters in which it is claimed that the court has abused its discretion." The jurisdictional statement filed by appellants makes no such showing, nor do appellants otherwise suggest what the abuse of discretion might be.

Appellants, bold as they are in their claims, would hardly go so far as to assert that appellees may not eventually become entitled to these impounded funds. What they must claim, therefore, is that they cannot, even at the discretion of the Court, be ordered restored to appellees at this time. In other words, their objection to the order of restoration is the same as to the refusal of the Court to grant them a stay. But the refusal of a stay is, of course, concededly discretionary with the Court. Appellants are, therefore, stopped at the threshold, unless they can demonstrate, as they plainly cannot, that they had an absolute legal right to

have the statutory court stay the distribution of these impounded funds until such time as the Secretary of Agriculture, an independent legislative tribunal whose proceedings cannot be controlled by that Court, might succeed in making a valid order.⁶ The mere statement of such a proposition is its own refutation.

It appears from the petition for appeal and the jurisdictional statement that it is made "pursuant to Section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Title 7, Section 217); the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28, Sections 44 and 47A) and the Act of February 13, 1925 (c. 229, 43 Stat. 938, U. S. C., Title 28, Section 345)." The cases relied on to sustain the jurisdiction of this Court are *B. & O. R. R. Co. v. United States*, 279 U. S. 781; *Atlantic Coast Line v. Florida*, 295 U. S. 301, and the prior decisions of this Court in this case.

Neither the majority nor the dissenting opinion in *Atlantic Coast Line v. Florida*, 295 U. S. 301, in any way supports the Government's contentions. In that case an order of the Interstate Commerce Commission had required intrastate rates for the transportation of logs, fixed by the Florida Railroad Commission, to be increased because discriminatory against interstate commerce. The statutory court sustained the order of the Interstate Commerce Commission. This Court reversed and held the order invalid on the ground that the Commission had failed to make the

⁶ On or about June 2, 1938, the Secretary of Agriculture purported to reopen these proceedings, upon the old findings of fact and without permitting any new evidence, for the sole purpose of "validating" his invalid order of June 14, 1933, as of that date. Although the statutory Court in its opinion said that there was not "any shred of reason or law" to support what the Secretary proposed to do, it has no way of instructing him to follow any other course. The only order he proposes to make, therefore, can have no effect upon the right to these impounded funds or even with respect to reparation awards, assuming contrary to fact, that all are not barred.

basic findings necessary to support its ultimate finding of a discrimination against interstate commerce. From the date when the Commission's order was made until a decree was entered upon this Court's reversal, the railroad had collected the higher rates required by the order of the Interstate Commerce Commission. After taking additional evidence and upon the basis of new findings,⁷ the Commission made another order which was sustained by this Court. The shippers who had intervened applied to the District Court for an order of restitution. It referred the matter to a master and confirmed his report which found reasonable rates to be intermediate between the Commission's rates and the Florida Railroad Commission's rates, and awarded restitution for about one-third of the excess collections made by the railroad. Upon appeal, a majority of this Court held that the shippers were entitled to no restitution, because it would not offend equity and good conscience for the railroad under the circumstances to retain the moneys collected,⁸ while the minority held that the shippers had a legal right to full restitution because the money was collected under an invalid order.

The case is of no assistance to the Government here. The commission men at the stockyards, who are the appellees here, have never collected anything they were not entitled to collect. By virtue of the express provisions of the Act, they were required under pain of civil and criminal penalties to collect the rates filed by them on May 11, 1932, until the Secretary should make a valid order prescribing

⁷ This is precisely what the Secretary proposes not to do in our case.

⁸ The opinion expressly states that there was no claim that conditions affecting reasonableness of rates had changed during the litigation (p. 316). This Court can judicially note that they greatly changed during the period 1933-1937, e. g., livestock prices rose.

An important equity also existed in the fact that the Florida state rates were confiscatory.

other rates. He has never made one. Appellees do not need the aid of equity to recover moneys from appellants in a restitution proceeding. The impounded moneys have always belonged to them. The very purpose of the impounding order was, of course, to avoid the necessity of any such proceeding. All that is needed by appellees at the most is an order from the Court, ministerial in character, directing the clerk to permit the withdrawal of the impounded funds. The Secretary's order being invalid and the terms of the impounding order being what they are, the appellants have no concern whatsoever with respect to the making of such an order, which could properly be made *ex parte* without notice to them because it in no way affects their rights.

Nor does the dissenting opinion in any way aid the Government in its contentions. Quite the reverse. Mr. Justice Roberts (with whom the Chief Justice, Mr. Justice Brandeis and Mr. Justice Stone concurred) thought that the railroad was required to make the refunds demanded. The majority opinion was based on the idea that since equitable restitution is a matter of grace, the balance of the equities in the particular situation justified refusal to refund, irrespective of legal rights. The basis of the dissenting opinion, however, is that, since this Court had held the first order of the Commission to be a nullity, it was the same as though it had never been made, and that unless those who had seasonably asserted their rights to refunds were granted such refunds, the Interstate Commerce Commission would have been permitted to unconstitutionally encroach upon the sovereign right of the State of Florida through its Railroad Commission to fix intrastate rates.

The Government, of course, is forced to contend in our case that restitution to the shippers will not be a mere matter of grace but a matter of right, although the impounded moneys were duly collected during a period which

no order of the Secretary can now affect, even if he took new evidence and made new findings, which he is expressly refraining from doing. Its position is, therefore, opposed to both the majority and dissenting opinions in the *Atlantic Coast Line* case.

It is difficult to see wherein appellants can derive any comfort from any of the opinions in the *Morgan* case. They are thus remitted to the *Baltimore & Ohio* case, *supra*, the only other case on which they rely. Nothing in that case aids appellants. As can be seen from the discussion on page 785, the application therein requested an order that one set of railroads make restitution to another set of railroads on account of charges illegally collected. Such an application was truly called "an equity proceeding resulting in a final decree." In our case, however, the statutory Court had no authority to conduct any such equity proceeding because in its final decree it did not reserve any jurisdiction (R. 195). Moreover, the order for the release of the impounded funds is a simple permissive order authorizing the clerk to release them, to which appellants are not parties, not "an equity proceeding resulting in a final decree." Nor did the statutory court, as it did in the *B. & O.* case, refuse "to give effect to" or "misconstrue" the mandate of this Court so that its action might be controlled by this Court "either upon a new appeal or upon writ of mandamus." On the contrary, it acted in strict conformity with the mandate of this Court, just as the lower courts did in *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, and *In the Matter of Lincoln Gas & Electric Co.*, 256 U. S. 512, in which it was necessary to enforce the provisions of appeal bonds.

Although appellants must necessarily claim that a refusal to stay the distribution of the impounded funds was not even within the discretion of the statutory court, they

neither rely upon Section 47 of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28), nor have they complied with Rule 12, Subdivision 1, of the rules of this Court which requires "a showing of the matters in which it is claimed that the court has abused its discretion." In reality they are appealing from a mere incident of a non-appealable temporary restraining order. Moreover, as we shall show, even assuming that the appeal technically lies, it is utterly without merit.

Reference to Sections 44, 46, 47 and 47A of the Urgent Deficiencies Act discloses that while an appeal is allowed to this Court from an order granting or denying a permanent or an interlocutory injunction, no such appeal is allowed from a mere temporary restraining order. The impounding of the funds in dispute was concededly a mere condition of obtaining a temporary restraining order, which is not appealable. It is thus impossible to contend that when such temporary restraining order has terminated by reason of the fact that a permanent injunction has issued, an order in the nature of a mere direction to the clerk to restore the impounded funds to the custody of their rightful owners is appealable.

It is clear for all of the above reasons that no appeal lies from the order of the statutory court.

II.

Motion to Affirm.

Pursuant to Paragraph 3 of Rule 12 and Paragraph 4 of Rule 7 of the Revised Rules of the Supreme Court of the United States, the appellees move in the alternative to affirm the order of the District Court on the ground that it is manifest that the appeal was taken for delay only, and that the question on which the decision of the cause depends is so insubstantial as not to need further argument.

1. *Prior Proceedings in the Case and History of Appellees' Rates.*

On April 25, 1938, this Court⁹ (one Justice dissenting) held that the order of the Secretary of Agriculture, made June 14, 1933, and purporting to fix the commission rates of appellees (hereinafter sometimes called Tariff No. 3), was wholly "invalid" because of the denial of a "full, fair and open hearing." The hearing which was granted was termed "fatally defective." A petition for rehearing was denied by this Court on May 31, 1938.

The appellees had on July 19, 1933, before the effective date of the Secretary's order, brought suit before a statutory Court sitting in the Western District of Missouri, to set the Secretary's order aside (R. 1).¹⁰ On May 11, 1932, they had, in accordance with Section 306 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168, U. S. C. Title 7, Section 207), filed with the Secretary of Agriculture a schedule of rates (hereinafter sometimes called Tariff No. 2), and have collected these rates ever since.

As is expressly admitted in the answer of the Secretary of Agriculture to the petition of the market agencies to the statutory court to set aside his order (R. 134-135), these rates were more than 10 per cent lower than the rates fixed by the Secretary of Agriculture to be effective January 1, 1926 (hereinafter sometimes called Tariff No. 1), and which had been continuously in effect up until the filing of the new schedule, Tariff No. 2.

Upon filing their suits to set aside the order of the Secretary of Agriculture, the market agencies obtained from the statutory court, as has been previously noted, a temporary restraining order against the enforcement of the Secre-

⁹ No. 581, October Term, 1937; petition for rehearing denied, May 31, 1938.

¹⁰ This and similar references are to the record filed in this Court in *Morgan v. United States*, No. 581, October Term, 1937.

tary's order (R. 127). This was continued in force by subsequent orders until the final disposition of the case by this Court (R. 130, 230). It was made a condition of this temporary restraining order that the market agencies should deposit with the Court the difference between the amounts they were collecting under the rates filed by them on May 11, 1932, and the rates fixed by the Secretary in his order of June 14, 1933, which were considerably lower. This impounding continued until November 1, 1937, at which time it ceased by reason of the fact that, as stated to this Court by Government counsel on the argument of the main appeal, new rates were put into effect by the Secretary pursuant to an agreement with the market agencies.

Upon the decision of this Court holding the Secretary's order of June 14, 1933, to be wholly invalid, the contention was made by the Government in the Court below, by means of a motion for a stay, that the impounded funds amounting to approximately \$600,000 should not be distributed until the Secretary should have opportunity to "validate" his wholly invalid order of June 14, 1933, *as of that date*. He has never indicated any desire or taken any steps to fix rates for the future. Appellees also moved for an order restoring the impounded funds to their possession. The Court denied the motion for a stay and granted the motion made by appellees for "restitution." Its *per curiam* opinion is submitted herewith: Among other things, it said:

"We consider that the motion of defendants ¹¹ has not the faintest shadow of merit."

"If this Court did not now order the return to the petitioners ¹² of the moneys deposited by them the Court itself would be guilty of bad faith."

"We do not consider that the Secretary's contention that he now can make an order prescribing rates and

¹¹ The Secretary of Agriculture and the United States.

¹² The appellees.

charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it."

2. *Argument.*

The statute provides (Section 310) that the Secretary of Agriculture may "after a full hearing" upon a complaint or upon his own motion, if he finds that existing rates are unreasonable, prescribe just and reasonable rates "to be thereafter observed." It denies the power (Sections 308 and 309) to make reparation orders, except upon petition of the shipper filed within ninety days after the cause of action has accrued. Whether the cause of action accrues upon the performance of the services for which the commission is charged; that is, the selling of the livestock, or upon payment therefor, makes no difference in this case, because it is not claimed that any reparation petitions have been filed within ninety days of either event in any case. As held in *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, the Secretary's order, even if it had been valid, would not have entitled any shipper to reparation. Indeed, the Secretary did not attempt to grant reparation for the period from May 11, 1932, to June 14, 1933, when Tariff No. 2 rates were collected without impounding.

In the face of these statutory provisions, the Secretary proposes to award reparation without the shippers having filed any timely petitions therefor, and this without taking any testimony as to conditions in the years 1933, 1934, 1935, 1936 and 1937, during which all the transactions, claimed to be the possible subject of reparation, took place. He proposes to do this by "validating" his wholly invalid rate order of June 14, 1933, which was predicated upon the wholly stale test year 1931. He does not propose to make any rates for the future but only for the period between June 14, 1933,

and November 1, 1937, during which the impounding continued.

Obviously, the Secretary is attempting to award reparation under the guise of "validating" a wholly invalid order, and this entirely upon his own motion, without timely petitions having been filed by the shippers. Even upon his own theory that he is entitled to reopen the proceedings, he was on June 14, 1933, only in the middle of a hearing. And yet he proposes to date his order not as of a date in the future "after a full hearing" has been completed, but as of a date five years ago when the hearing was incomplete. He does not propose to make rates "thereafter to be observed" but only to "validate" his invalid rates because, to his mind,¹³ they ought to have been observed during a past period, and this without taking any evidence as to what were reasonable rates during the period. It is entirely plain that he is utterly without power to do what he proposes.

But were the fact otherwise, it would have no bearing upon the merits of this appeal. The Court has no power to hold, without any authorization in the statute, the impounded funds as security, even for reparation claims which might possibly be established, much less in a situation where no reparation claims have been made and none can be made because all are barred by the ninety-day statute of limitations. The Secretary's orders have only *prima facie* effect in connection with reparation, and judgment can only be obtained in the courts. Assuming that valid reparation claims could possibly be brought at this time, which is contrary to the fact, they might well be established in other courts than the District Court for the Western District of

¹³ In denying the Secretary's petition for a rehearing, this Court said:

"From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

Missouri, and could not be established at all in the statutory court which holds the impounded funds but only before ordinary courts and juries. Do appellants contend that these funds can be transferred between courts without statutory authority? It is plain that there is not an iota of sense in the contentions made by appellants, and that the Government's argument below, which doubtless will be repeated here, rests entirely upon a long series of palpable fallacies. Among these are the following:

1. That the excess of the proceeds of legally filed rates, over and above wholly invalid rates fixed by the Secretary, cannot be finally and definitively collected until the reasonableness of the filed rates, which must be collected under pain of civil and criminal penalties (Sec. 306), has been adjudicated by an administrative tribunal or court.

This is plainly untrue, first, because if, as is the fact here, the rates are lower than effective maximum rates duly established by the rate-making agency,¹⁴ they are lawful rates as well as legal rates, and never can be the subject of reparation proceedings. *Arizona Grocery Company v. Atchison, etc., R. R.*, 284 U. S. 370. Secondly, it is untrue because the right to reparation is lost by failure to file a claim within the statutory period of limitations, in this case ninety days; no matter how unreasonable the legally filed rates may be considered by the Secretary. *Phillips v. Grand Trunk Ry.*, *supra*.

2. That the statutory court, which is a judicial body, has any control over or concern with what the Secretary of Agriculture, who is an agent of the legislature

¹⁴ Tariff No. 1, established by the Secretary of Agriculture effective January 1, 1926, and never attempted to be altered by any subsequent order, except the wholly invalid order of June 14, 1933.

for rate-fixing purposes, does in the future with respect to making an order, until its jurisdiction is regularly invoked by proceedings to enforce or set aside.

Assuming, therefore, contrary to fact, that the Secretary of Agriculture has the power to make the retroactive order he proposes, and that he should make the same order which he pretended to make on June 14, 1933, this nevertheless would be no reason at all for the Court to delay or bar the return of the impounded funds to the market agencies. *A fortiori*, if there is no "shred of law or reason" in what the Secretary proposes to do, is it not ridiculous to contend that a Court, which has no power to stop him, or direct him aright, must stay its hand while he proceeds in direct violation of the statute?

3. That the Secretary of Agriculture is not required in good faith to hear and consider the arguments of the market agencies, but may set out to "validate" his wholly invalid order of June 14, 1933, after a perfunctory hearing.

This is the necessary implication of a proposal to "validate" as of June 14, 1933, because it is obvious that unless the terms of the new order should be precisely the same as those of the wholly invalid order of June 14, 1933, it could not, assuming all of the Secretary's arguments are sound, possibly be dated as of that date.

4. That in determining the validity of the existing rates which appellees filed under the Act, the substantive provisions of the Act can be separated from the procedural provisions.

While rates "to be thereafter observed" can always be made at any time "after a full hearing," the rates duly

filed with the Secretary of Agriculture by the market agencies are legal and conclusively presumed to be reasonable in so far as reparation is concerned as against any shipper who has not within ninety days after he paid for the services filed a claim for reparation; and if, as is the case of the rates in question, they are lower than maximum rates previously authorized by the Secretary, they are conclusively presumed to be valid even if timely petitions for reparation are filed. *Arizona Grocery case, supra.*

5. That the impounded funds can be considered in some way as being security for reparation claims, even if such timely claims could now be made, the fact being that none can now be made because over six months have elapsed since the impounding ceased.

Reparation claims are tort claims for damages. It is absurd to contend that they are secured by the impounded funds.

6. That upon the termination of the temporary restraining order (as a condition of obtaining which the provision for impounding was made), the market agencies did not automatically become entitled to an order permitting them to withdraw these funds, the Secretary's order being invalid.

7. That it was the absolute right of appellants to have a stay of distribution from the statutory court, and was not even discretionary with the statutory court to refuse to stay the distribution of the impounded funds.

8. That the findings of the statutory court (now set aside by this Court) with respect to the rates fixed by the Secretary's subordinates not being unreasonable now have or ever had any bearing whatsoever upon the

reasonableness or unreasonableness of the rates filed by the market agencies as Tariff No. 2.

All the statutory court was empowered to do, in any event, was to determine whether the Secretary's pretended order fixing "reasonable rates" was supported by some evidence. Since the Secretary's order was wholly invalid for other reasons, it was not even empowered to do that.

9. That even if the Secretary's order had been upheld by this Court as valid, any reparation could have been ordered by him in the absence of timely petitions therefor filed by the shippers. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662.

10. That the pendency of the litigation over the Secretary's order of June 14, 1933, in any way prevented the filing of reparation claims with the Secretary or action thereon by the Secretary.

Of course, the Secretary, if he had accorded "full, fair and open" hearings, could have awarded reparation to shippers who filed petitions therefor, and the shippers would not have had to put their sole reliance upon the return of the impounded funds as the result of their possible expectation that the Secretary's order would be held valid. Plainly the Act intended to discourage reparation claims by providing for a short statute of limitations and for individual action. Since a reparation order of the Secretary is only *prima facie* evidence in the courts (Sec. 309f), it is obvious that some reparation claimants may win and some may lose on the same state of facts. This is the result intended by the statute, and the Secretary's argument that it is unjust should be addressed to the Congress and not to this Court.

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11. That the result of reparation proceedings would necessarily have been the same as if the Secretary's order made upon his own motion had been valid and had thus resulted in refunds to the shippers from the impounded funds.

Obviously, for the reasons just stated, the results might be very different; and again the argument as to unfairness should be directed to the Congress and not to this Court.

12. That without being in a position to fix any rate for the future, which could apply to this case, the Secretary can, by "validating" his wholly invalid order of June 14, 1933, as the "public representative" of the shippers, award reparation in the absence of timely complaints from shippers, and without taking any evidence as to the situation in the years 1933-1937, during which all the transactions by reason of which reparation might have been claimed if the rates were unreasonable, took place. *Phillips v. Grand Trunk Ry., supra.*

13. That any shipper, under any circumstances, now that the Secretary's order of June 14, 1933, has been declared invalid, can have any claim against the impounded funds.

14. That the date June 14, 1933, has any such special significance that a new order made by the Secretary could be dated as of this date.

It is merely the date when the Secretary signed a piece of paper, and has no more significance than the date of his original order of inquiry, the date of his order for a rehearing, or the date of his attempted reopening of the proceedings before him. At the most it is merely a date

in the middle of the administrative proceedings when nothing valid or definitive had taken place.

Prayer for Dismissal or Affirmance.

It is, therefore, respectfully submitted that for the reasons previously stated the appeal should be dismissed or the decree of the District Court should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,

JOHN B. GAGE,

Attorneys for Appellees.

THOMAS T. COOKE,

CARSON E. COWHERD,

Of Counsel.

Dated, July 12, 1938.

EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION.

In Equity.

No. 2328 and Related Cases Nos. 2329-78.

F. O. MORGAN, Doing Business as F. O. MORGAN SHEEP COM-
MISSION COMPANY, ET AL., *Petitioners*,

vs.

THE UNITED STATES OF AMERICA and the SECRETARY OF
AGRICULTURE, *Defendants*.

Before VAN VALKENBURGH, Circuit Judge and REEVES and
OTIS, District Judges.

Per CURIAM:

The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1933, petitioners sought injunctive relief against enforcement of that order. This Court (July 22, 1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the

amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

By agreement of counsel the temporary restraining orders, so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766). Petitioners appealed. The Supreme Court on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. 298 U. S. 468. After the remand and a presentation anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court on April 25, 1938 (— U. S. —) reversed outright the decrees of this Court, on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating \$586,093.32 paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter, after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners,

the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall "be thereafter observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order entered contemporaneously herewith. To that order defendants are allowed an exception.

United States Circuit Judge.

United States District Judge.

United States District Judge.

(6782).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE
SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O. MORGAN
SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI

**BRIEF FOR APPELLEES IN OPPOSITION TO APPLICA-
TION OF APPELLANTS FOR A STAY AND SUPER-
SEDEAS PENDING APPEAL**

FREDERICK H. WOOD,

JOHN B. GAGE,

Counsel for Appellees.

THOMAS T. COOKE,

CARSON E. COWHERD,

Of Counsel.

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**BRIEF FOR APPELLEES IN OPPOSITION TO APPLICATION
OF APPELLANTS FOR A STAY AND SUPERSEDEAS PENDING APPEAL**

THE CASE BELOW

The case below is unreported and the opinion upon the order appealed from, which was made and entered June 18, 1938, appears at R. 248. The court below denied without opinion an application for a stay and supersedeas of the "enforcement, operation and execution" of the order appealed from. This order has been omitted in printing the record (Index, p. ii). Application for such stay and supersedeas was thereafter made to Associate Justice Pierce Butler and was referred by him to the Court.

JURISDICTION OF THE COURT

The jurisdiction of this Court is attempted to be invoked in accordance with the following statement made in the jurisdictional statement under Rule 12 filed by appellants:

"Section 316 of the Packers and Stockyards Act (7 U. S. C., Section 217) provides:

"For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168.)

"The applicable provisions of the laws relating to suits brought to suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals from orders or decrees made in such suits are found in Title 28, U. S. Code, Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220). Section 47 provides for a hearing by a three-judge court upon an application for an interlocutory injunction to sustain or restrain the enforcement of orders of the Interstate Commerce Commission; and further provides:

"* * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same re-

quirement as to judges and the same procedure as to expedition and appeal shall apply.

"Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48. Section 47a provides in part as follows:

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

"Section 238 of the Judicial Code as amended (28 U. S. C., Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act of 1921 (7 U. S. C. Section 217)."

This jurisdictional statement also says:

"The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *B. & O. RR. Co. v. United States et al.*, 279 U. S. 781; *Atlantic Coast Line v. Florida*, 295 U. S. 301; and *Morgan et al. v. United States et al.*, 297 U. S. 468, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed. 1031."

Neither the statutory provisions cited nor the decided cases referred to give any support to the claim of appellants that their appeal is from a "final judgment or decree" or that this Court for any other reason has jurisdiction of their appeal (see Argument, pp. 8 *et seq.*, *post*).

STATEMENT

This brief is in opposition to an application for a stay pending the decision of this Court upon an appeal from an order of a specially-constituted District Court for the Western District of Missouri, made and entered June 18, 1938, which carried out the mandate of this Court (R. 182-4) filed June 6, 1938, by ordering the release to appellees of certain impounded funds, after reversing, in accordance with said mandate, a decree made and entered by said District Court on July 9, 1937, which refused to hold invalid or to permanently enjoin an order of the Secretary of Agriculture, dated June 14, 1933, fixing the commission rates chargeable by appellees.

Appellees oppose the stay upon the grounds: (1) that the order is not appealable, because it is not a "final judgment or decree" or otherwise appealable, and that hence this Court has no jurisdiction; (2) that even if appealable, the order was made in the exercise of discretion, and appellants have not specified any abuse thereof; and (3) that the points raised upon the appeal are unsubstantial and the appeal is frivolous.

On July 27, 1923,¹ after arbitration proceedings, the then Secretary of Agriculture prescribed commission rates

¹See R. 230. In our Statement opposing Jurisdiction and Motion to Dismiss or Affirm, this date was erroneously given as January 1, 1926.

to be charged by appellees, who are market agencies at the Kansas City Stockyards, in the buying and selling of live-stock as agents for the consignors thereof (R. 212-230). These rates (hereinafter sometimes referred to as Tariff No. 1) continued in effect until May 11, 1932, when appellees filed with the Secretary, pursuant to Section 306 of the Packers and Stockyards Act of 1921, a new schedule of rates (hereinafter sometimes called Tariff No. 2). This schedule fixed rates below the maximums approved by the Secretary on July 27, 1923. Appellants have conceded that the new rates involved a 10% cut. (Answer to Petition to Set Aside, R. 133.)

In the Fall of 1930, the Secretary of Agriculture commenced proceedings to investigate the reasonableness of the rates authorized in Tariff No. 1. This investigation, which was based upon the test year 1929, concluded with an order dated May 18, 1932. This, however, was promptly set aside by the Secretary by reason of changed conditions and a rehearing ordered, which was based upon the test year 1931, and eventuated in the invalid order of the Secretary of June 14, 1933, heretofore referred to (R. 21-24).

Before the effective date of the Secretary's order, appellees filed with the statutory court for the Western District of Missouri a petition to set aside, and a few days later, on July 22, 1933, obtained a temporary restraining order (R. 129-130) conditioned upon their depositing in court the difference between what they would continue to collect under their filed rates (Tariff No. 2) and the rates fixed in the Secretary's order of June 14, 1933, now invalidated, which were considerably lower (hereinafter sometimes called Tariff No. 3).

By the express terms of this temporary restraining order it appears that these deposits were to be made to secure repayment of overcharges by the market agencies to the consignors of livestock, in the event the Secretary's order should eventually be held to be valid by the court, and that the temporary restraining order against the Secretary's reduced rates going into force was made to protect the market agencies against inability to collect from the consignors the difference between the filed rates and the Secretary's rates, in the event the Secretary's order should be declared invalid. It was provided that the deposits in court should continue to be made "pending final disposition of this cause" (R. 130).

This is the third time that this Court has been appealed to in this matter. On the first appeal it reversed and remanded because the District Court had improperly stricken from the petition to set aside, filed by the market agencies, allegations concerning the denial of a "full, fair and open" hearing. (*Morgan v. U. S.*, 298 U. S. 468.) On the second appeal, after this issue had been tried, it again reversed and remanded for proceedings in conformity with its opinion on the ground that the Secretary had denied the market agencies a "full, fair and open" hearing. (*Morgan v. U. S.*, No. 581, October Term, 1937, 303 U. S. —, 58 Sup. Ct. 773; petition for rehearing denied on *per curiam* opinion, May 31, 1938, 303 U. S. —, 58 Sup. Ct. 999.) It termed the hearing before the Secretary "fatally defective" and the order invalid. The reasons for so holding were that the Secretary had never fairly apprised the market agencies of the specific issues in the case of his claims and contentions with respect to what the evidence showed, and without so doing had approved find-

ings of fact and an order prepared by subordinates, including the active prosecutors for the Department of Agriculture, after private conferences with them and without notice to the market agencies of what the findings contained or opportunity to argue with respect thereto. The Government petitioned for a rehearing which was denied upon a *per curiam* opinion in which the Court said: "From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

Upon receiving the mandate of this Court the statutory court entered its decree adjudging the Secretary's order of June 14, 1933, to be void and invalid and permanently enjoining him from enforcing it (R. 203-4). The Government, however, moved (R. 184) for a stay of the distribution of the funds impounded in the Court, amounting to some \$600,000, pending further proceedings which they asserted the Secretary planned to take to "validate" his order, as of June 14, 1933 (R. 185). This motion was denied (R. 250). The order denying it is not appealed from. Appellees moved for an order permitting them to withdraw the impounded funds from the registry of the Court. This motion was granted, and it is from the order granting it that the Government appeals (R. 200-2, 208). In its opinion granting the motion, the statutory Court expressed the opinion that the Government's contentions "had not the faintest shadow of merit"; that it would be an act of bad faith in view of the understanding pursuant to which the funds were deposited and the terms of the temporary restraining order for the Court to refuse to return the impounded funds to appellees, and that the Secretary's pro-

positional to make a *nunc pro tunc* order² as of June 14, 1933, by "validating" his invalid order of that date, was contrary to the statute and devoid of any, "shred of reason or law to support it" (R. 248-250).

The Government then applied to the statutory court for a stay and supersedeas, pending decision upon this appeal, against the "enforcement, operation and execution" of the order appealed from. The statutory court denied the stay. Application was then made to Mr. Justice Butler of this Court who referred the matter to the Court.

ARGUMENT

I.

No appeal lies to this Court from the order of the court below releasing the funds impounded pursuant to the temporary restraining order:

1. The order is not appealable because under the statute no appeal now lies or ever did lie from the granting of the temporary restraining order, much less from a mere incident of its granting or dissolution.

Pursuant to the mandate of this Court to proceed in conformity with its opinion (R. 182), the statutory Court entered its final judgment and decree holding the order, made June 14, 1933 by the Secretary of Agriculture, to be void and invalid and permanently enjoining its enforcement (R. 203). The Government is not appealing from this

²On page 17 of the Government's brief in opposition to our Motion to Dismiss or Affirm, this objective is admitted.

al judgment and decree which this Court has explicitly ordered to be made.

Nor does the Government appeal from the refusal of statutory Court to grant its motion to stay the distribution of the impounded funds (R. 184-5, 250) pending action which it represents that the Secretary of Agriculture opposes to take in order to "validate" his invalid order of June 14, 1933, as of that date. It appeals only from an order made by the statutory Court as the necessary consequence of its refusal to stay the distribution of the impounded funds, to wit, an order directing their release to appellees. If it had appealed from the refusal of the stay order, the Government could not possibly have argued that it was absolved from the necessity of showing an abuse of discretion, which it would have been utterly unable to show. But it claims upon this appeal, nevertheless, that the order directing the distribution of the impounded funds, which was the necessary consequence of the refusal to grant stay, was not mandatory upon the Court nor even discretionary with it, *but that it was mandatory for the Court to refuse to order the distribution pending the proposed action of the Secretary*. Or to put it another way, the appellants had an absolute right that pending action by the Secretary the impounded funds should not be distributed. This inevitably follows because no attempt is made to claim any abuse of discretion. Indeed appellants admit in their brief in opposition to our motion to dismiss or affirm (pp. 13-14) that they do not claim abuse of discretion but assert that as a matter of law the District Court had no right to use the stay or order the distribution.

Under the applicable sections of the United States Code (Title 28, Sections 47 and 47-a) appeals lie to this Court

(1) from the granting or denying of an interlocutory injunction, and (2) from "A final judgment or decree" of the District Court in the cases specified in Section 44. By virtue of Section 47, the statutory Court is authorized upon a specific finding that "irreparable damage would otherwise ensue to the petitioner", to allow a temporary stay or suspension of the operation of an order of the Secretary of Agriculture, pending the application for an interlocutory injunction and hearing and decision thereon. In this case such a temporary stay or suspension was ordered on July 22, 1933, a few days after the filing of the petition to set aside, and immediately before the Secretary's order would have become effective (R. 129). No appeal is allowed by the statute from the granting or denying of such a temporary stay or suspension, and none was attempted to be taken. By further orders of the Court this temporary stay or restraining order was extended pending decision of the statutory Court upon the application for temporary and permanent injunctions and thereafter pending the appeals to this Court (R. 130, 181). The Court denied both types of injunction at the same time (R. 170-1). The last extension was on consent of the Government (R. 182).

The statutory Court could, of course, under the statute, have granted this temporary restraining order without requiring any impounding. As previously stated, the appellees had, on May 11, 1932, filed with the Secretary of Agriculture a schedule of rates and charges, known as Tariff No. 2, and these rates and charges were being collected by them pursuant to law (Sec. 306) at the time the statutory Court granted to them a temporary restraining order against the rates set by the Secretary in his order of June 14, 1933. These rates of the Secretary's being tempo-

arily enjoined by the statutory Court, appellees were, of course, legally entitled, and indeed required, to continue to charge their filed rates which were higher than those fixed by the Secretary. Instead, however, of granting to appellees a temporary restraining order against the Secretary's rates without the impounding condition, the statutory Court made it a condition of the granting of the order that appellees impound with the Court the amounts collected by them, pursuant to their filed rates, in excess of what would have been collected by them under the Secretary's rates which were enjoined. The hearing before the Secretary having been held by this Court to have been "fatally defective" and his order of June 14, 1933 attempting to fix rates having been held "invalid", and the statutory Court having entered its final judgment and decree pursuant to the mandate of this Court, it is now contended that the statutory Court had no power, even in its discretion, to order the return to appellees of the impounded funds deposited pursuant to its temporary restraining order, and that its order releasing them is appealable to this Court as "a final judgment or decree" of the District Court.

This claim amounts to an assertion that although the statutory Court was not required to order the impounding in the first place as a condition of granting the temporary restraining order, and could have terminated the impounding at any time by an order which clearly would have been interlocutory and non-appealable, and that although no appeal lies from the granting of the temporary restraining order, or any of its incidents, and none was taken, nevertheless this restoration of the *status quo* by the Court, now that the temporary restraining order has terminated by expiration, is something that this Court may review as a

"final judgment or decree" of the District Court, simply because it is the last act done by the Court.

It is the contention of appellees, which will be later argued, that the terms of the temporary restraining order being entirely unambiguous, it was required that, upon the Secretary's order being set aside as invalid, the impounded funds be immediately returned to those who had always owned them and who had merely deposited them as security for claims no longer possible of establishment. It is clear, however, that no appeal lies for an entirely different reason going to the very heart of appellants' contentions. Their theory is (and we assume its validity for the sake of the argument, despite its absurdity) that the "cause" is not yet terminated because the Secretary is entitled to an opportunity to "validate" his order of June 14, 1933, by now affording a "full, fair and open" hearing to appellees, after which he will make a *nunc pro tunc* order as of June 14, 1933. The statutory Court can then, it is argued, be required to distribute the impounded funds in accordance with the order of the Secretary now "validated." This argument plainly defeats the principal claim of appellants that this Court has jurisdiction of the appeal because it is from "a final judgment or decree" of the District Court. On this theory, even the decree entered by the statutory Court pursuant to the mandate of this Court, adjudging the Secretary's order invalid and permanently restraining him from enforcing it, is an interlocutory decree, because further proceedings must be permitted to the end that the Secretary's order may be "validated" and enforced in the "cause" then pending in Court. *A fortiori*, the order releasing the impounded funds is interlocutory, and the Government's argument falls to the ground.

2. While it was discretionary with the Court whether or not to release the impounded funds so long as the temporary restraining order was in force, it was mandatory by reason of the purpose of the deposits and the unambiguous terms of the orders, to release them when appellees no longer required any temporary restraining order, and hence no appeal lies.

Under Section 306 of the Packers and Stockyards Act, the appellees as market agencies were required to file with the Secretary a Schedule of Rates, which they did on May 11, 1932. It was thereafter obligatory upon them to charge these rates, and had they not done so they would have been subject to civil and criminal penalties (Sec. 306). Once the Secretary's rates were enjoined, as they were by the temporary restraining order, the appellees not only had the legal right to collect their filed rates but were required by law to do so. Thus the entire proceeds of these rates charged by them belonged to them from the moment the charges were paid by the consignors of the livestock. Pursuant to the temporary restraining order and as a condition thereof, the appellees were required to deposit a part of the proceeds of these collections with the statutory Court. These deposits were required to be made "pending final disposition of this cause" (R. 130). This "cause" cannot possibly refer to anything other than the suit to set aside the Secretary's order. While the temporary restraining order does not expressly provide that the deposits were to be made as security for the possible liability of the market agencies equivalent to the excess sums collected, in the event the Secretary's order should be declared valid in the courts, it may be inferred that such was one of the purposes. The expressed purpose of the temporary restraining order,

however, was to prevent the irreparable injury which would otherwise accrue to the market agencies from inability to collect from the consignors of the livestock in the event the Secretary's order should be declared invalid, as it was. The right of the market agencies to collect their filed rates and charges is expressly conceded in the order, as is the fact that sums equivalent to the amounts of money impounded would be wholly lost to the market agencies "in the event the said petition prayed was finally granted by this court". Such relief having been granted by this Court, the statutory Court had no other option but to order the release of these impounded moneys to the appellees. Whether or not the point goes to the appealability of the order or the utter frivolousness of the appeal, it is unanswerable.

3. The only cases relied on by the Government to sustain the jurisdiction of this Court are not in point.

The only cases relied on by the Government to sustain the jurisdiction of this Court are *B. & O. R.R. Co. v. United States*, 279 U. S. 781; *Atlantic Coast Line v. Florida*, 295 U. S. 301; and the prior decisions of this Court in this *Morgan* case. In the *B. & O.* case the lower court did not fully carry out the mandate of this Court and was required to do so. Nothing in any of the *Morgan* case opinions appears to us to be of any assistance to appellants. Nor is the *Atlantic Coast Line* case in any way in point.

It is difficult to see wherein appellants can derive any comfort from the *Baltimore & Ohio* case, *supra*. In that case this Court reversed a decree of the statutory Court requiring the east side roads to absorb carriage charges across the Mississippi, which decree relieved the west side roads of these charges. As can be seen from the discussion on page 785, the application made to the statutory Court

after mandate requested an order that the west side roads make restitution to the east side roads on account of the charges illegally collected. Such an application was truly called by this Court "an equity proceeding resulting in a final decree." In our case, however, the statutory Court had in the first place no authority to conduct any such equity proceeding because in its final decree (which was reversed) it did not reserve any jurisdiction to do so (R. 170-1). But more important, the order for the release of the impounded funds was a simple permissive order authorizing the clerk to release them, to which appellants were not necessary parties, not "an equity proceeding resulting in a final decree" in favor of one party and against another. Nor did the statutory Court, as it did in the *B. & O.* case, refuse "to give effect to" or "misconstrue" the mandate of this Court so that its action might be controlled by this Court "either upon a new appeal or upon writ of mandamus." On the contrary it acted in strict conformity with the mandate of this Court, just as the lower courts did in *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, and *In the Matter of Lincoln Gas & Electric Co.*, 256 U. S. 512, in which it was necessary to enforce the provisions of appeal bonds. Having done so, it is immaterial whether or not the order is incidental to or a part of the main suit because it merely exhausts the mandate. Had the order deviated from the mandate, there would necessarily be a remedy, as this Court has held. The case does not aid appellants in the least.

Neither the majority nor the dissenting opinion in *Atlantic Coast Line v. Florida*, 295 U. S. 301, in any way supports the Government's contentions. In that case an order of the Interstate Commerce Commission had required intrastate rates for the transportation of logs, fixed by the

Florida Railroad Commission, to be increased because discriminatory against interstate commerce. The statutory Court sustained the order of the Interstate Commerce Commission. This Court reversed and held the order invalid on the ground that the Commission had failed to set forth the basic findings necessary to support its ultimate finding of a discrimination against interstate commerce.¹ From the date when the Commission's order was made until a decree was entered upon this Court's reversal, the railroad had collected the higher rates required by the order of the Interstate Commerce Commission. After taking additional evidence and upon the basis of new findings,² the Commission made another order which was sustained by this Court. The shippers who had intervened applied to the District Court for an order of restitution. It referred the matter to a master and confirmed his report which found reasonable rates to be intermediate between the Commission's rates and the Florida Railroad Commission's rates, and awarded restitution for about one-third of the excess collections made by the railroad. Upon appeal, a majority of this Court held that the shippers were entitled to no restitution, because it would not offend equity and good conscience for the railroad to retain the moneys collected, when it had under the circumstances been compelled to charge the higher rates by Commission and court order.³ The minority held that the

¹*Non constat* that it may not have actually made them.

²This is precisely what the Secretary cannot do if he is to "validate" his order *nunc pro tunc*.

³The opinion expressly states that there was no claim that conditions affecting reasonableness of rates had changed during the litigation (p. 316). This Court can judicially note that in our case they greatly changed during the period 1933-1937, e.g., livestock prices rose considerably, as indeed the Secretary admits (R. 192).

An important equity also existed in the fact that the Florida state rates were confiscatory.

shippers had a legal right to full restitution because the money was collected under an invalid order.

The case is of no assistance to the Government here. The commissionmen at the stockyards, who are the appellees here, have never collected anything they were not entitled to collect. By virtue of the express provisions of the Act, they were required under pain of civil and criminal penalties to collect the rates filed by them on May 11, 1932, until the Secretary should make a valid order prescribing other rates. He has never made one. Appellees do not need or seek the aid of equity to recover moneys from appellants in a restitution proceeding. The shoe is on the other foot, and without having any equity to do so, appellants are seeking restitution for the consignors. The impounded moneys have always belonged to appellees. The very purpose of the impounding order was, of course, to avoid the necessity of any restitution proceeding. All that was needed by appellees at the most was an order from the Court, ministerial in character, directing the clerk to permit the withdrawal of the impounded funds. The Secretary's order being invalid, and the terms of the impounding order being what they are, the appellants have no concern whatsoever with respect to the making of such an order, which could properly be made *ex parte* without notice to them because it in no way affects their rights.

Nor does the dissenting opinion in any way aid the Government in its contentions. Quite the reverse. Mr. Justice Roberts (with whom the Chief Justice, Mr. Justice Brandeis and Mr. Justice Stone concurred) thought that the railroad was required to make the refunds demanded. The majority opinion was based on the idea that since equitable restitution is a matter of grace, the balance of the equities in the

particular situation justified refusal to refund, irrespective of legal rights. The basis of the dissenting opinion, however, is that, since this Court had held the first order of the Commission to be invalid, it was the same as though it had never been made, and that unless those who had seasonably asserted their rights to refunds were granted such refunds, the Interstate Commerce Commission would have been permitted to unconstitutionally encroach upon the sovereign right of the State of Florida through its Railroad Commission to fix intrastate rates.

The Government, of course, is forced to contend in our case that restitution to the consignors or shippers will not be a mere matter of grace but a matter of right, although the impounded moneys were duly collected during a period which no order of the Secretary can now control, even if he took new evidence and made new findings. Its position is, therefore, opposed to both the majority and dissenting opinions in the *Atlantic Coast Line* case.

II.

Assuming that the order is technically appealable, the appeal is utterly without merit and the stay should be denied.

1. The statute expressly forbids a *nunc pro tunc* order which is the only kind of order the Secretary proposes to make and the only kind which could conceivably affect the impounded funds.

In its *per curiam* opinion (R. 249) the statutory Court, after saying,

"We consider that the motion of defendants (the Secretary of Agriculture and the United States) *has not the faintest shadow of merit.*"

went on to say:

"We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it" (R. 250).

The reasons it gave were that the statute¹ expressly requires that any order made by the Secretary shall be made only "after full hearing" and that any rates fixed by the Secretary shall be rates "to be thereafter observed" (Sec. 310).

In the face of these provisions of the statute the Secretary proposes to make an order dated as of a time when even according to his own theory it is indisputable that the concluding parts of the hearing had not taken place. That is, he now proposes to serve upon the market agencies his definitive findings of fact and order, held by this Court to be invalid, as his tentative findings and order, and to permit argument thereon. Thus even yet, taking his own theory at full face value, the "full hearing" is obviously not complete, and, *a fortiori*, it was not complete five years ago. As a result of this reopened hearing, he proposes not to make rates "thereafter to be observed" but to usurp a full measure of judicial power not only in violation of the statute but in violation of Article III of the Constitution and make rates which he shall ordain ought to have been observed during the period June 14, 1933, to November 1, 1937.

¹The pertinent sections are printed in Appendix A.

It therefore clearly appears that even if the serious errors made by the Secretary could in any way be cured,² they could not be cured to permit his order to have retro-active effect, but only to permit his order to be effective in the future. It is therefore unnecessary to consider the possibility, if any, of their being cured.

There are at least two cogent reasons, moreover, why the Secretary cannot, proceeding as he is proceeding, even make an order to be effective in the future. In the first place, by agreement with the market agencies, he issued new rates effective November 1, 1937, upon an express admission of changed conditions (R. 191-4). In the second place, the record is wholly stale, being directed to the test years 1929 and 1931, and if permitted to be used at all in connection with the making of a new order applicable to the future, must necessarily be supplemented by a full hearing with relation to the conditions obtaining in the years 1933 through 1937 and the reasonableness of appellants' rates in the light of these conditions.³

2. The Government's attempt to compel the statutory Court to hold the impounded funds pending further action by the Secretary is based on a wholly fallacious premise.

Even assuming, contrary to the express provisions of the statute, that the Secretary could in some way make a *nunc pro tunc* order as of June 14, 1933, this would be no reason whatsoever for holding up the release of the im-

²Cf. this Court's *per curiam* opinion denying petition for rehearing in which it said: "That is more than an irregularity in practice; it is a vital defect."

³Any argument that the Secretary will permit new evidence is futile, at least until he withdraws the old findings based entirely on the old evidence.

impounded funds to appellees. The funds were indisputably impounded in connection with the particular "cause" then pending in the statutory Court, to wit, the suit to set aside as invalid the Secretary's order of June 14, 1933. This cause having been disposed of adversely to the Secretary's order, the impounded funds must necessarily be released to those who deposited them. What the Secretary may or may not do thereafter has no bearing whatsoever upon their release. The Court cannot control the Secretary, who is an independent legislative agency, in the performance of his administrative duty, although it may set aside his orders after he has made them. No more can the Secretary control the Court in the performance of its judicial duty. Thus, even if any cogent reason existed, as it does not, for retaining the impounded funds pending action by the Secretary, it is respectfully suggested that this Court does not possess the power to instruct a lower court to comply with the Secretary's wishes when no error in its action is shown.

But no cogent reason does exist for holding up the release of the impounded funds because appellants' argument proceeds upon a wholly fallacious premise. This false assumption is that the Courts in reviewing administrative orders can finally determine that such orders are invalid only by a decision "on the merits" and may not finally invalidate them on procedural grounds. This argument misconceives the nature of judicial review of the orders of administrative tribunals. Such orders are not reviewed "on the merits", although that expression may be colloquially used to distinguish between the always present question of whether the findings are supported by some evidence and other less frequently raised irregularities in the administrative proceeding. The sole function of the reviewing court, except in so far as it reviews the weight of the evidence on

jurisdictional and constitutional questions, is to review the regularity of the proceedings before the administrative tribunal. A holding by the reviewing court that such tribunal has acted arbitrarily and capriciously in making findings without evidence to support them is just as much a holding upon a procedural question as a holding that the administrative tribunal has not afforded adequate opportunity for argument or has failed to consider the evidence before it.

The courts, of course, never make any determinations of their own as to what rates are reasonable in a given situation. Frequently their jurisdiction is invoked to declare that rate-fixing orders are confiscatory, but no such point is involved in this case. *Acker v. United States*, 298 U. S. 426. In a situation such as is here presented the reviewing courts merely determine whether there was any evidence before the administrative tribunal to justify its findings with respect to what rates are reasonable. If the court finds that the rates fixed by the administrative tribunal are supported by no evidence, it will set aside the tribunal's order as arbitrary and capricious, not because the court has decided anything "on the merits", but because the procedure of the administrative tribunal has been irregular.

It makes no difference, therefore, what reason influences the reviewing court to invalidate the order of an administrative tribunal, for no matter what the reason was, such an order cannot be later revived as of the date when it was made, although in some circumstances it is conceivable that the old record can be availed of, at least to some extent, in making an order effective for the future.

The rate orders of the Secretary of Agriculture like those of the I. C. C., are, in effect, statutes applicable to the future. *Arizona Grocery Company v. Atchison, etc.*

R., 284 U. S. 370. They must necessarily be based upon the experience of the past. But when what was the future when this order of June 14, 1933, was made, is over and gone with, and has become the past, it is plainly not possible to ignore it by now fixing rates as of June 14, 1933, through the device of a *nunc pro tunc* order.⁴ It is said, however, that the errors although admittedly serious were not "jurisdictional". We need not quarrel about words, but it is clear that the Secretary had no power or jurisdiction to make the order declared invalid and has no power or jurisdiction to make the *nunc pro tunc* order he proposes to make.

The statute (Sec. 310) expressly withholds power from the Secretary to make a valid rate-fixing order without having granted "a full hearing". When he refused to state specific issues for the market agencies to argue upon, or to make known to them his claims or contentions with respect to what the evidence showed, and when he made his pre-ordered order by accepting the findings of his subordinates after private conferences with them and without himself considering the evidence, he did what he had absolutely no power to do, and his act was a complete nullity. Had he, after issuing his order of inquiry, attempted to make a rate-fixing order without having had any evidence taken at all, his order would have been no more invalid. In so far as the validity of his order is concerned, it can make no difference whether he makes findings without evidence in the record to support them, or whether he fails to take any evidence at all, or whether he fails to read and consider the

⁴In his argument before Mr. Justice Butler, Government counsel expressly admitted that this was the Secretary's sole purpose (Appendix B, p. xxx *post*). See also R. 185 and page 17 of Government's opposition to motion to dismiss or affirm.

evidence which has been taken. *Cf. Morgan v. U. S.*, 298 U. S. 468, at page 480. In each and every case his order is null and void, and it cannot be resuscitated or revived, five years later, in the teeth of the provisions of the statute.

What then is the great question of administrative law which the Solicitor General (wholly improperly, we think) seeks to make this routine order a vehicle for the decision of? Perhaps it can be posed this way: Can an administrative tribunal, which is both prosecutor and judge, when its orders have been invalidated in the courts for serious irregularities in its conduct of the hearing, proceed to "validate" these orders, not merely for the future but *nunc pro tunc*, and require the courts to stay their hand while it does so and give effect to the "validated" orders when made? If this question should be answered in the affirmative, it is obvious that there is nothing to stop an administrative tribunal acting in its judicial capacity from acceding to all the requests of its prosecuting arm and denying to the other party every statutory or constitutional right it is requested to deny, in the secure knowledge that if its order is finally held invalid by the courts it can proceed to "validate" it *nunc pro tunc* by offering to accord or pretending to accord the right or rights previously denied. Since the courts may invalidate its order for a particular irregularity, without considering other alleged irregularities, as was done in this very case, it may continue to refuse other rights until the courts in the particular case shall have held, perhaps one by one, that they must be accorded, thus conducting a potentially unlimited number of administrative proceedings during which it accords to the litigants before it not the full rights belonging to them under the law, but the only minimum of these rights which it dares not withhold. The mere statement of such a proposition is its refutation.

3. Without having any power whatsoever to do so, the Secretary is merely attempting to award reparation under guise of a *nunc pro tunc* order.

The statute provides (Section 310) that the Secretary of Agriculture may "after a full hearing" upon a complaint upon his own motion, if he finds that existing rates are reasonable, prescribe just and reasonable rates "to be thereafter observed." It denies the power (Sections 308-309) to make reparation orders, except upon petition of the shipper filed within ninety days after the cause of action has accrued. Whether the cause of action accrues in the performance of the services for which the commission is charged; that is, the selling of the livestock, or non-payment therefor, makes no difference in this case, because it is not claimed that any reparation petitions have been filed within ninety days of either event in any case. As held in *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, the Secretary's order, even if it had been valid, would not be entitled to any shipper to reparation. Indeed, the Secretary did not attempt to grant reparation for the period from May 11, 1932, to June 14, 1933, when Tariff No. 2 rates were collected without impounding.

In the face of these statutory provisions, the Secretary proposes to award reparation without the shippers having filed any timely petitions therefor, and not on the basis of "as many as to conditions in the years 1933, 1934, 1935, 1936 and 1937, during which all the transactions, claimed to be the possible subject of reparation, took place." He proposes to do this by "validating" his wholly invalid rate order of June 14, 1933, which was predicated upon the now wholly invalid test year 1931. He does not propose to make any award for the future but only for the period between June

14, 1933, and November 1, 1937, during which the impounding continued.

Obviously, the Secretary is attempting to award reparation under the guise of "validating" a wholly invalid order, and this entirely upon his own motion, without timely petitions having been filed by the shippers. Even upon his own theory that he is entitled to reopen the proceedings, he was on June 14, 1933, only in the middle of a hearing. And yet he proposes to date his order not as of a date in the future "after a full hearing" has been completed, but as of a date five years ago when the hearing was incomplete. He does not propose to make rates "thereafter to be observed" but only to "validate" his invalid rates because, to his mind, they ought to have been observed during a past period. It is entirely plain that he is utterly without power to do what he proposes.

But were the fact otherwise, it would have no bearing upon the merits of this appeal. The statutory Court has no power to hold, without any authorization in the statute, the impounded funds as security, even for reparation claims which might possibly be established, much less in a situation where no reparation claims have been made and none can be made because all are barred by the ninety-day statute of limitations. The Secretary's orders have only *prima facie* effect in connection with reparation, and judgment can only be obtained in the courts. Assuming that valid reparation claims could possibly be brought at this time, which is

⁵In denying the Secretary's petition for a rehearing, this Court said:

"From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

contrary to the fact, they might well be established in other courts than the District Court for the Western District of Missouri, and could not be established at all in the statutory Court which holds the impounded funds but only before ordinary courts and juries. Do appellants contend that these funds can be transferred between courts without statutory authority? It is plain that there is not an iota of sense in the contentions made by appellants, and that the Government's argument rests entirely upon a long series of palpable fallacies and wrong assumptions. Among these are the following:

1. That the excess of the proceeds of legally filed rates, over and above wholly invalid rates fixed by the Secretary, cannot be finally and definitively collected until the reasonableness of the filed rates, which must be collected under pain of civil and criminal penalties (Sec. 306), has been adjudicated by the Secretary.

This is plainly untrue, first, because if, as is the fact here, the rates are lower than effective maximum rates duly established by the rate-making agency,⁶ they are lawful rates as well as legal rates, and never can be the subject of reparation proceedings. *Arizona Grocery Company v. Atchison, etc., R. R.*, 284 U. S. 370. Secondly, it is untrue because the right to reparation is lost by failure to file a claim within the statutory period of limitations, in this case ninety days, no matter how unreasonable the legally filed

⁶Tariff No. 1, established by the Secretary of Agriculture on July 27, 1923, and never attempted to be altered by any subsequent order, except the wholly invalid order of June 14, 1933 (R. 230).

rates may be considered by the Secretary. *Phillips v. Grand Trunk Ry., supra.*

2. That the statutory Court, which is a judicial body, has any control over or concern with what the Secretary of Agriculture, who is an agent of the Legislature for rate-fixing purposes, does in the future with respect to making an order, until its jurisdiction is regularly invoked by proceedings to enforce or set aside.

Assuming, therefore, contrary to fact, that the Secretary of Agriculture has the power to make the retroactive order he proposes, and that he should make the same order which he pretended to make on June 14, 1933, this nevertheless would be no reason at all for the Court to delay or bar the return of the impounded funds to the market agencies. *A fortiori*, if there is no "shred of law or reason" in what the Secretary proposes to do, is it not ridiculous to contend that a Court, which has no power to stop him, or direct him aright, must upon his request stay its hand and commit what it regards as an act of bad faith (R. 249) while he proceeds in direct violation of the statute?

3. That the Secretary of Agriculture is not required in good faith to hear and consider the arguments of the market agencies, but may set out to "validate" his wholly invalid order of June 14, 1933, after a perfunctory hearing.

This is the necessary implication of a proposal to "validate" as of June 14, 1933, because it is obvious that unless the terms of the new order should be precisely the same as those of the wholly invalid order of June 14, 1933, it could

assuming all of the Secretary's arguments are sound, it may be dated as of that date.

4. That in determining the validity of the existing rates which appellees filed under the Act, the substantive provisions of the Act can be separated from the procedural provisions.

While rates "to be thereafter observed" can always be set at any time "after a full hearing," the rates duly filed with the Secretary of Agriculture by the market agent are legal and conclusively presumed to be reasonable insofar as reparation is concerned as against any shipper who has not within ninety days after he paid for the service filed a claim for reparation; and if, as is the case of the rates in question, they are lower than maximum rates previously authorized by the Secretary, they are conclusively presumed to be valid even if timely petitions for reparation are filed. *Arizona Grocery Case, supra*.

5. That the impounded funds can be considered in some way as being security for reparation claims, even if such timely claims could now be made, the fact being that none can now be made because over six months have elapsed since the impounding ceased.

Reparation claims are tort claims for damages. It is hard to contend that they are secured by the impounded funds.

6. That upon the termination by limitation of the temporary restraining order (as a condition of obtaining which the provision for impounding was

made), and the "cause" having been disposed of, the market agencies did not automatically become entitled to an order permitting them to withdraw these funds.

7. That it was the absolute right of appellants to have a stay of distribution from the statutory Court, and that it was not even discretionary with it to refuse to stay the distribution of the impounded funds and turn them over to their rightful owners.

8. That the statutory Court was ever empowered to make its own findings upon the weight of the evidence, and if it were so empowered, that its findings now invalidated by this Court can have any bearing upon the reasonableness or unreasonableness of the rates filed by the market agencies as Tariff No. 2, and especially in view of the fact that the actual findings of the statutory Court were that the Secretary's findings were contrary to the weight of the evidence on the most important subjects (R. 240-1).

All the statutory Court was empowered to do, in any event, was to determine whether the Secretary's pretended order fixing "reasonable rates" was supported by some evidence. Since the Secretary's order was wholly invalid for other reasons, it was not even empowered to do that.

9. That even if the Secretary's order had been upheld by this Court as valid, any reparation could have been ordered by him in the absence of timely petitions therefor filed by the shippers. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662.

10. That the pendency of the litigation over the Secretary's order of June 14, 1933, in any way prevented the filing of reparation claims with the Secretary or action thereon by the Secretary.

Of course, the Secretary, if he had accorded "full, fair and open" hearings, could have awarded reparation to shippers who filed petitions therefor, and the shippers would not have had to put their sole reliance upon the security of the impounded funds which was of no value to them if the Secretary's order should be held invalid as it was. Plainly the Act intended to discourage reparation claims by providing for a short statute of limitations and for individual action. Since a reparation order of the Secretary is only *prima facie* evidence in the courts (Sec. 309f), it is obvious that some reparation claimants may win and some may lose on the same state of facts. This is the result intended by the statute, and the Secretary's argument that it is unjust should be addressed to the Congress and not to this Court.

11. That the result of reparation proceedings would necessarily have been the same as if the Secretary's order made upon his own motion had been held valid and had thus resulted in refunds to the shippers from the impounded funds, if the repayment were not otherwise made.

Obviously, for the reasons just stated, the results might be very different; and again the argument as to unfairness should be directed to the Congress and not to this Court.

12. That without being in a position to fix any rates for the future, which could apply to this case, the Secretary can, by "validating" his wholly in-

valid order of June 14, 1933, as the "public representative" of the shippers, award reparation in the absence of timely complaints from shippers, on a foundation of findings made on evidence having no relation to the situation in the years 1933-1937, during which all the transactions by reason of which reparation might have been claimed if the rates were unreasonable, took place. *Phillips v. Grand Trunk Ry., supra.*

13. That any shipper, under any circumstances, now that the Secretary's order of June 14, 1933, has been declared invalid, can have any claim against the impounded funds.

14. That the date June 14, 1933, has any such special significance that a new order made by the Secretary could be dated as of this date.

It is merely the date when the Secretary signed a piece of paper, and has no more significance than the date of his original order of inquiry, the date of his order for a rehearing, or the date of his attempted reopening of the proceedings before him. At the most it is merely a date in the middle of the administrative proceedings when nothing valid or definitive had taken place.

Appellants have judiciously refrained from making any argument in their brief on the merits of their appeal. Therefore by reason of the fact that it so clearly shows the complete lack of merit in this appeal, we annex hereto as Appendix B the transcript of the argument before Mr. Justice Butler upon application to him for a stay. From this and the briefs upon our motion to dismiss or affirm

it clearly appears that nothing more remains to be said and that no purpose whatever would be served by oral argument.

It is respectfully submitted that the application for a stay should be denied.

Respectfully submitted,

FREDERICK H. WOOD,
JOHN B. GAGE,
Counsel for Appellees.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

Dated, September 10, 1938.

APPENDIX A

Packers and Stockyards Act of 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64,
42 Stat. 159, et seq.)

Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard:

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.¹ It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

¹Amended by an act of Congress approved May 5, 1926.

ply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency which stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part of the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less

than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty-days referred to in subdivision (a) no person shall carry on the business of a

stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on its livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in the schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner or market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices with respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or han-

ing, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions or subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

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APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No.

THE UNITED STATES OF AMERICA
AND THE SECRETARY OF AGRICULTURE,
Appellants,

vs.

F. O. MORGAN, doing business as F. O. MORGAN
SHEEP COMMISSION COMPANY, *et al.,*
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI

WASHINGTON, D. C.,
Wednesday, July 13, 1938.

A meeting was held in the Chambers of Mr. Justice
Butler, at 11 o'clock a. m., for argument on a petition for
an order staying and superseding the final order and decree
of the District Court of the United States for the Western
District of Missouri, entered on June 18, 1938, in the
above-entitled cause.

APPEARANCES:

On behalf of the Appellants:

MR. THURMAN ARNOLD, *Assistant Attorney
General.*

MR. WENDELL BERGE, *Special Assistant to the
Attorney General.*

On behalf of the Appellees:

MR. RICHARD H. WILMER.

MR. THOMAS T. COOKE

MR. JUSTICE BUTLER. A petition has been filed for an order staying and superseding an order of the United States District Court for the Western District of Missouri, in a case in which the United States and the Secretary of Agriculture are the appellants, and F. O. Morgan, doing business as F. O. Morgan Sheep Commission Company and others, are appellees. The petition does not appear formally to be addressed to me, but it is to be inferred from its form that it is addressed to the Court. I cannot act as a Court, and unless it be amended to be addressed to me as a Justice of the Court, there will be no use in taking time in addressing arguments to me.

MR. ARNOLD. May we amend?

MR. JUSTICE BUTLER. Yes. I will hear the applicants.

**Argument of Mr. Thurman Arnold, Assistant
Attorney General**

MR. ARNOLD. As your Honor will recall, the United States District Court for the Western District of Missouri upheld an order of the Secretary of Agriculture prescribing maximum rates, and this Court reversed that decision for a procedural defect, to wit, that reasonable opportunity to know the claims of opposing parties was not given to the marketing agency, and that there was no concrete statement of the claim. I will not review that, because I assume your Honor is familiar with it. I will briefly review the proceedings subsequent to the opinion.

Your Honor will recall that one of the points made by the Solicitor General on the petition for a rehearing was that the first opinion of this Court involved turning over the impounded funds to the marketing agencies which had been held not to be entitled to them on the merits. That was intimated by the Solicitor General, and was definitely claimed by the attorneys for the marketing agencies. In denying the petition for rehearing the Court specifically stated that this question had not been decided, that the

disposition of the funds was not before the Supreme Court of the United States, and that the subsequent orders which the Secretary might make, and the matter of the disposition of those subsequent orders, were to be determined by the District Court, and were not questions open on the present state of the record, a position which I think is quite correct, because no court should decide on the validity of any order of the Secretary concerning those funds or the disposition of the case on its merits before it was made.

After that opinion denying the rehearing had been handed down, the Secretary of Agriculture, in an attempt to conform to the suggestion of the Court and to cure the procedural defect, reopened the ~~proceedings~~ and served findings on the marketing agencies, and gave them 30 days in which to file exceptions. Then the defendants, the Government, moved to stay further proceedings and that the money be retained, and at the same time the marketing agencies moved for an order to pay out the impounded funds.

Next, the District Court, by a decree, set aside the Secretary's order and at the same time directed that the impounded funds be disbursed forthwith.

From that final order and decree an appeal was taken to this Court, and along with the petition for appeal the Government asked for an order staying the distribution of the impounded funds pending the appeal. The appeal was granted, but the petition for the stay was denied by the District Court on June 30th.

If the stay is not granted, we think this question will become moot, and that our right of a hearing on the question by the full bench will be destroyed. We are not here to argue the merits of the appeal, but only to seek an opportunity to present the merits of the appeal to the full bench.

I think that is exactly what the Supreme Court intended to give us. I will read the last paragraph of the decision in their opinion on the rehearing. The Court said:

"The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide."

It would seem that if our objections are not frivolous the appeal from the disposition which the District Court actually made should be heard by the full bench, and it would seem to me that the only thing to be decided here is whether our objections are frivolous.

The lower court in effect passed on the order before the Secretary made it, in other words, it made a decision before the Secretary had taken any of the steps which are suggested by the court. What steps the Secretary would take of course is a hypothetical question, and this Court said it should not attempt to forecast or hypothetically decide that question. Of course we think that that is exactly what the District Court in effect did, and that certainly that objection is well-taken.

As to whether the Secretary has power to do anything in this circumstance, it would seem to me that we certainly would have a right to appeal on that, because the questions are of grave importance.

The question really revolves around this situation. Assume that there is a procedural defect in this case, the absence of the full opportunity to argue upon the findings which had been submitted in advance; assume a procedural defect. Is it jurisdictional, or is it not jurisdictional? That is a question of tremendous and far-reaching importance in our whole administrative set-up. We are not here suggesting as to whether our contentions are right or wrong, but only that it is of the greatest importance that we get an opinion of the full bench on that question, for the purpose of knowing what we are to do ourselves, for the purpose of knowing whether proper changes in the law, clarifying the effect of amendment for procedural defects, should not be made. I take it that the denial of the stay is simply to deny us any chance of having that question passed upon by the full bench.

There is an additional point which is of tremendous interest, not so much to the Department of Justice or the Government in its administrative interpretation, but a plain, simple question of justice. There is certainly no injustice done to the shippers in staying these proceedings and having this matter all decided in one suit.

MR. JUSTICE BUTLER. Whom do you mean by "shippers"?

MR. ARNOLD. I mean the market agencies. I should not say "shippers;" I should say the market agencies, in this case. In other words, it would seem to me that, so far as their own interests are concerned, they will get an important decision here which would have to be arrived at by a very complex process otherwise. That of course depends on whether there is any merit at all in our complaint. Further than that, the actual effect of the position taken by the attorneys for the market agencies is to have a procedural defect determine the merits of the case, which has been decided by the lower court, and on which the Supreme Court has not specifically passed.

Finally, the very provision of the order under which these funds are kept reads that they are to be impounded during the pendency of the cause. If this cause is not finally determined, if it may be reopened after the opinion of the Court pointing out the procedural defect, then this cause is still pending, and the funds must be impounded, and once they are turned loose, can only be on the theory that the cause has been terminated. That is a question which we do not think we should argue before your Honor, because we conceive our position here to be only that we should have on that and these other questions a hearing before the full bench, that the question is one of enormous importance, that it should be settled as expeditiously as possible, and that there is no reason in law or in justice why we should be in substance deprived of our appeal from the order of the Court which it seems to me quite clear the opinion on the rehearing indicated the Court intended to give us.

That, your Honor, is all I care to say, but I have asked Mr. Berge not to argue the merits of the questions which will probably be presented on this appeal, but merely to outline them for you, to the end that you may be able to see that they are not of such a frivolous character that our appeal should be in effect denied.

**Argument of Mr. Wendell Berge, Special Assistant
to the Attorney General**

MR. JUSTICE BUTLER. I would like to have you state for the record the provision of the decree from which you appeal, the words of the decree.

MR. BERGE. Of course, the provisions of the decree from which we appeal are rather long. The decree provides that the aggregate amount of the impounded money, which is stated to be \$586,000 and something over, should be restored and refunded to each of the plaintiffs, as set forth in exhibit made a part of the order, which details the names

of the plaintiffs, the amounts they have paid in, with certain deductions from them, and the net amounts due to the plaintiffs. Then it appoints certain parties to act as custodians of the funds, and to work out the mechanics of the refunding process, and certain specific directions to those custodians are given.

MR. JUSTICE BUTLER. Your petition for appeal identifies the clauses of the decree from which you have read?

MR. BERGE. We appeal from the whole decree, your Honor.

MR. JUSTICE BUTLER. Is this decree a part of the decree setting aside the order, or is it a separate matter?

MR. BERGE. No; there were two separate decrees.

MR. JUSTICE BUTLER. Then this order was made upon the petition of the agencies for the return of the deposits?

MR. BERGE. Yes. The Government did not oppose the entry of a decree on the mandate enjoining the enforcement of the Secretary's order, but motions were made.

MR. JUSTICE BUTLER. What does that decree state?

MR. BERGE. It does not recite anything with respect to the impounded funds.

MR. JUSTICE BUTLER. What does it say with respect to the order in question?

MR. BERGE. The decree merely recites that—

“The decree entered herein on July 9, 1937—

That is, the old decree, which was appealed from, the case heard by this Court the past winter—

“The decree entered herein on July 9, 1937 is hereby vacated, set aside and for naught held.”

Then it states that—

“The purported order of the defendant, the Secretary of Agriculture of the United States of June 14, 1933, referred to and made a part of the petitions of the respective plaintiffs as Exhibit ‘A’, and

the same is hereby decreed void and of no effect, and is permanently suspended, enjoined, set aside and annulled, and the defendant, Henry A. Wallace, Secretary of Agriculture, and each and all of the officers, attorneys, solicitors and agents of the United States and all other persons acting or claiming or assuming to act, by or under the authority of the defendants, or either of them, are hereby forever restrained and enjoined from instituting, prosecuting or aiding in instituting or prosecuting any proceeding or action in respect of the enforcement, operation or execution of said order, and each and every part thereof.

"And it is further adjudged and decreed that such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933 as to law and justice may appertain, and that the parties may apply to this court upon the foot of this decree for such further orders and directions as may be necessary or seem meet and proper to the court with respect to the funds and moneys so impounded."

MR. JUSTICE BUTLER. There is no appeal from the decree setting aside the order of the Secretary?

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. Prescribing the charges and restraining their enforcement?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. That is final.

MR. BERGE. That order is entered pursuant to the mandate of this Court, and it is not appealed from.

Following the entry of this decree the market agencies made motions for immediate distribution, the Government made motions to stay the distribution, and hearing was held on them.

MR. JUSTICE BUTLER. What are the provisions of the order of the Court under which the deposits were made?

MR. BERGE. A temporary restraining order was granted, with consent of the Government, when this suit was instituted, and after restraining the enforcement of the order pending the litigation, this provision was appended:

"Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

That order was from time to time extended.

MR. JUSTICE BUTLER. Was there any order providing for the disposition of the fund, or specifying the conditions upon which it would be disbursed?

MR. BERGE. There was no order, your Honor, until this order from which we are now appealing.

MR. JUSTICE BUTLER. I mean any provision in any of the orders requiring the deposits.

MR. BERGE. No. My recollection is that this is the only order entered with respect to the deposits except that from time to time there were stipulations and orders extending the application of this. For a time it was extended every 30 or 60 days. Later a stipulation was entered that this order should be in effect throughout the litigation.

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MR. JUSTICE BUTLER. Is there controversy between the parties as to how it should be construed?

MR. BERGE. I think to this extent there is, that as to this clause, "and pending final disposition of this cause," I believe the market agencies would contend that the cause is terminated, and we would contend that the cause is still open.

MR. JUSTICE BUTLER. What do you mean by "the cause"—the suit to set aside the order? Is that what you mean by "the cause"?

MR. BERGE. We would contend that the initial suit which was brought is not terminated as long as the money is held by the court and until appropriate proceedings have been taken with respect to the money pursuant to this Court's mandate. We contend, in other words, that it was clear from the paragraph of the opinion of this Court which Mr. Arnold read that the question of the distribution of the moneys was an open one, to be considered in relation to whatever proceedings the Secretary may have instituted, and was not foreclosed merely by the decision of this Court that the order was invalid for want of a proper hearing, that that does not conclude the disposition of the funds.

MR. JUSTICE BUTLER. Is there any difference between the parties as to the purpose for which the deposits were made?

MR. BERGE. I suppose there is. I think the Government would take the position on the appeal that it was contemplated, when the deposits were made, that there would be a decision on the merits, and that of course the precise course of this litigation could not be forecast in anybody's mind.

MR. JUSTICE BUTLER. The decision of what on the merits?

MR. BERGE. As to the validity of the order.

MR. JUSTICE BUTLER. What do you mean by that? I do not quite follow you.

MR. BERGE. As to whether or not the order of the Secretary was fair and reasonable, and can be supported by evi-

lence. We take the position on this appeal that the decision of the Court that the order was invalid for want of a proper hearing does not necessarily foreclose the disposition of the money, that the money was impounded because it was contemplated at the time that there would be a decision as to whether the rates in question were fair or unfair, and that the money should be held at least a reasonable time until the Secretary has had an opportunity to correct the defect which this Court found to exist in the procedure.

What I would like to do is just briefly to state the issues which our appeal presents, not with the thought at all of arguing them.

MR. JUSTICE BUTLER. I have not quite made my purpose clear. I wanted to ascertain whether the parties are in agreement as to the purpose for which the deposits were made. The language which you read was merely that each of these plaintiffs would at stated times deposit with the clerk of the court the amount of money that was represented by the difference between the old rates and the rates which were challenged, the prescribed rates which were challenged. What was the purpose of that deposit? What does the Government say the purpose of that deposit was?

MR. BERGE. Stating it in general terms, and non-technically, we think the difference was deposited until it could be determined whether or not the rates prescribed by the Secretary were fair and reasonable, or whether they were unfair.

MR. JUSTICE BUTLER. For whose benefit were the moneys deposited?

MR. BERGE. I suppose the answer to that question depends on what the ultimate determination of the question of the fairness of the rates is. The moneys were held for the shipper in the event the rates were held to be fair, for the commission men in the event the rates were held to be unfair. We do not concede, we do not believe, that it was contemplated that the disposition of the money should depend on a procedural defect, without a determination as to the fairness, if there be machinery for correcting the procedural

defect, as we think there is. So the money was held not technically in escrow, but perhaps analogous to escrow. It was held to await the determination of the question of the fairness of the rates, as to whether the money should go back to the rate-payers, or to the commission men. To answer the question practically, this is an outcome which no one could foresee, and was not in anybody's mind.

MR. JUSTICE BUTLER. What were the grounds on which the order was attacked?

MR. BERGE. It was attacked on a great many grounds.

MR. JUSTICE BUTLER. What was the first ground of attack in the bill of complaint?

MR. BERGE. I do not recall all the recitations chronologically, but I think the first one chronologically in the petition was that the procedure was unfair; but that was one of a dozen.

MR. JUSTICE BUTLER. Unfair in what respect?

MR. BERGE. In the first place, they allege that each of them was entitled to a separate hearing. That question never reached the Supreme Court. The District Court held that was not a proper objection, and struck that allegation, and they did not press it further. They tried to present the question that their rights were not joint but several, and should be severally heard, and they alleged that it was improper not to furnish them with a tentative report, tentative findings, to which they could file exceptions.

MR. JUSTICE BUTLER. Was not the ground on which the decision rests alleged in the bill, that the Secretary did not hear or decide the case?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. That was the sole ground on which the order was held invalid and has been decreed to be invalid?

MR. BERGE. That is the sole ground on which the decision of the Supreme Court rests, yes.

MR. JUSTICE BUTLER. And the mandate is carried with it, the judgment?

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. So that the bill attacks the order as invalid on several grounds, the first of which was the ground on which this Court rested its decision, that the Secretary did not comply with the statute in respect of hearing and deciding the case. Am I right about that?

MR. BERGE. Yes, I think your Honor is right in stating that the ground on which the decision was made by this Court was among the grounds pleaded. I do not want to say without reexamining the petition that it was the first ground.

MR. JUSTICE BUTLER. Whether it was the first or the second or the last—

MR. BERGE. We are not contending that the ground of this Court's decision went beyond the pleadings, although the pleadings did not allege it in quite the manner of a final decision. But there is an allegation that the Secretary did not grant a fair hearing and there are numerous detailed allegations with respect to it, some of which this Court adopted, and some of which we think it did not.

MR. JUSTICE BUTLER. If the order had been sustained, then what would have become of the money in accordance with the order on which it was deposited?

MR. BERGE. I cannot conceive that there could have been a decision sustaining the order without holding that the rates were fair and reasonable. If this Court had been otherwise inclined to view the case, had decided that the hearing was fair, they would have to proceed to decide the merits.

MR. JUSTICE BUTLER. Was the issue of fairness or reasonableness of the rates for the District Court or for this Court?

MR. BERGE. I think it was decidedly for both Courts.

MR. JUSTICE BUTLER. That is, whether the rates were reasonable? What do you mean by the fairness of the rates? Is that a judicial question?

MR. BERGE. I am speaking perhaps loosely, but the language of the statute I think is "just and reasonable."

MR. JUSTICE BUTLER. That is for the Secretary.

MR. BERGE. In the first instance.

MR. JUSTICE BUTLER. If he ascertains it in procedure conforming to the statute, that is the end of it, is it not?

MR. BERGE. Unless on final review it is held that there is no substantial evidence to support it.

MR. JUSTICE BUTLER. I know, but there is no judicial question as to the reasonableness of the rates. There is a question of law as to whether there was any evidence on which the determination might rest. You are not suggesting here, are you, that the Court was called upon to decide or could have decided if it had been called on to decide whether the rates were fair or just or reasonable or non-discriminatory, are you?

MR. BERGE. No. I was perhaps using language rather loosely, but I was thinking that if your Honors had held that there was no substantial evidence to support the order, that would have been to hold that the Secretary's findings were unreasonable. I think myself in terms of the latter reasoning when there is no question of confiscation involved. I conceive of this case as being one where there was no confiscation, hence there is no question of de novo judgment of the courts. On the other hand, whether the Secretary acted with substantive evidence or not is a question for judicial review, and is a question which is properly presented to the Court. When I used the word "reasonableness", I used it in that connotation, and perhaps that is not a correct technical description of it.

The real question, undoubtedly, which the parties thought was submitted to the District Court, was whether or not there was substantive evidence to support the findings, and of course the plaintiffs, the first time the case was heard in the District Court, also urged that the rates were confiscatory. That was before the decision of this Court in the Acker case. We contended there was no question of

confiscation, and until the first decision of this Court I think the parties viewed the hearing point as decidedly a subsidiary point. In the first place, after the District Court granted the Government's motion to strike those procedural allegations, opponents took their exceptions. There was no appeal from that order, and on the final appeal both sides devoted approximately 200 pages of their briefs to the merits, and about five or six pages to the hearing point, and similar time on oral argument was devoted to those issues. If we want to look beyond the technical pleading situation to what was in the minds of the parties, I am sure that throughout the course of this litigation, until the first decision of this Court, it was a question of whether the rates were substantially supported by evidence, or whether the action of the Secretary was arbitrary.

I do not at this time care to argue the questions which we conceive to be involved in the appeal and which should, we think, be fully heard, because whether we are right or wrong, the question is immensely important, as Mr. Arnold has indicated. It is important to the administrative arm of the Government to know whether the procedural mistake in this case, even though serious, conceding the seriousness of it and the unfair effect which it may have on the rights of private parties, a mistake made in good faith in the administration of the law after years of administrative proceedings—and I might parenthetically note that this proceeding originated in 1929, with two long hearings, involving many months and the expenditure of considerably more than \$50,000 by the administrative branch of the Government in developing the case, all done in the belief that they were acting according to the forms of law, and a decision by the District Court on the merits, once reaffirmed, twice in the record, a decision that the rates not only were supported by substantive evidence, but were supported by the weight of the evidence.

The importance of the question to us is whether a procedural error, however serious, is going finally to deter-

mine substantive rights, if there be a method open for correction of that error which does not prejudice the rights of any of the parties, and even though we may be wrong in our belief that it can be done by this method, it is important to have a determination by the Supreme Court so that, first, the administrative arm of the Government will know; and, second, so that intelligent consideration can be given to the question of amending the law, because the practical effect of this sort of action is quite disastrous to the rate-making power.

Before I outline, briefly, what the issues on the appeal will be, I want to note that we concede, of course, that the impounded funds should not be paid over to the shippers at this time.

MR. JUSTICE BUTLER. Whom do you mean by "the shippers"?

MR. BERGE. Those who ship livestock to the Kansas City market, and who would get this money back.

MR. JUSTICE BUTLER. The consignors.

MR. BERGE. The consignors of livestock who would be the ultimate beneficiaries of this fund if this order had been upheld, or if, as we believe, it may be properly corrected. We are not asking that the money go back to the shippers at this time.

MR. JUSTICE BUTLER. You mean the consignors. I cannot accept the idea of shippers, in some way. Mr. Arnold thought the shippers were the agencies.

MR. BERGE. Mr. Arnold I think on that point just mis-spoke. In our loose talk around the office we describe the consignors as the shippers.

MR. JUSTICE BUTLER. Let me see if I understand the purpose of this deposit. I think that is essential to your application. Let us take the case of Morgan. He sold for Farmer A a carload of cattle after the new rates fixed by the Secretary's order became effective. He sought to have that order enjoined and he went to the court and asked for restraint pending the suit, the determination of the case. Am I right about that?

MR. BERGE. You are.

MR. JUSTICE BUTLER. And by consent of the parties, or acquiescence of the parties and the court, no temporary injunction was ever granted as a temporary injunction, but merely a restraining order, continued from time to time by consent. The court presumably—though you have told me nothing that indicates that it so ruled—indicated that the restraint would only be granted upon condition, and that condition was that security be given for restitution of the excess. Is that it?

MR. BERGE. Yes, that is it. Of course, if you want to know actually how the thing was presented—

MR. JUSTICE BUTLER. I want to know, if I can, whether the parties agreed upon the conditions on which the deposits were made, that is, whether they construed the record alike, and if so, I want to know that construction, and if they do not agree about it, I want to know your construction of it. We will say that there was \$10 difference between a charge made by Morgan and that prescribed by the Secretary's order, which has been held invalid. On what condition was that \$10 deposited, according to your construction of the record?

MR. BERGE. According to our construction of the record that \$10 was deposited pending final disposition of the cause and we say that the cause has not terminated until there has been a full hearing on the Secretary's right to correct a procedural defect. I do not see how I can answer that question any more plainly than that.

MR. JUSTICE BUTLER. If the decree of the District Court upholding the order had been affirmed, then, according to the terms of the deposit as you construe it, what would have become of the money?

MR. BERGE. If the decree of the District Court had been upheld the order holding that the order was within the Secretary's power and was amply supported by evidence, the order was not arbitrary, therefore, in effect, was fair, the money would go back to the consignors.

MR. JUSTICE BUTLER. Was it deposited to be paid by the clerk of the court to the consignors, or as security that Morgan & Company would make restitution?

MR. BERGE. Of course, the order does not speak on that subject but knowing the practical aspects of this business to some extent I think it was probably in the minds of the parties that the money would be paid to the consignors under supervision of the court because many of these men would have been unable to make separate payment and it would naturally be assumed that during the course of the operation some of them would go out of business. They are not men who operate with large capital.

I think no doubt it was contemplated that when the validity of the order was finally settled, the question with respect to the power to enter the order, and whether it was substantially supported by evidence, the court would then make disposition of the money in accordance with the equities of the situation, and outline in the decree, as is generally done in decrees with reference to refunding, the detailed mechanics of the procedure. I do not think it could have been contemplated at that time that all of those details would be worked out. In the other cases of this nature we have handled, the original orders were pretty general in terms, and at the conclusion of the litigation we tried to work out a decree which would do full equity in view of the decision of the Supreme Court.

I just thought of it at the time, I am not sure that the analogy is fully applicable, but at the same time the Acker case was up, there was heard an appeal in the Corrick case. You may recall that before the Acker case reached this Court the lower court had terminated the impounding against our objection on some technical grounds. I cannot recall in detail, but we came up with two cases presenting the situation where there had been impounding through a part of the litigation, and we were appealing from an order which terminated it and also an order which in effect terminated the order of the Secretary on some grounds with

which we disagreed. We won both of those cases. This Court affirmed the Acker case and reversed the Corrick case, which left a situation in which the consignors were entitled to full refunding but there was in the coffers of the District Court only enough money to cover the refunding up to the time of the decision in the Corrick case. We were able to work out a separate decree in each case which required a refunding through the court as to a part of the money and through the Commission as to the other part.

MR. JUSTICE BUTLER. So that the funds would be regarded as security in the nature of a bond to make restitution, and if they make restitution, that is the end of it; if they do not, suit is brought on the bond.

MR. BERGE. I would suppose that in the case where a bond is given, the commission men would make their refunds direct, and merely come into court with proof that they had fully complied, whereas where there is impounding, the custom has been to make the refunds direct, the money never goes through the hands of the commission men.

I should like to allude to the fact that there cannot be any real hardship worked in this case by granting this stay until the appeal can be heard. The impounding commenced five years ago this month. The original restraining order was entered on July 22, 1933. The impounding, however, was terminated last fall, in October, when the Secretary, on an informal presentation of facts, agreed that prospectively from that date they were entitled to the higher rates, and the rates which were put into effect pursuant to stipulation made with the Secretary were sufficient to terminate the impounding. There has been no impounding since last October.

Your Honor asked me some questions about that matter at the time the appeal was argued this past spring. So that the commission men are not required to make any further impounding, if this stay is granted, are not required to pay any more money into court.

MR. JUSTICE BUTLER. The rates currently to be charged since November, 1937, are not in controversy?

MR. BERGE. That is true.

MR. JUSTICE BUTLER. The only thing that is in controversy is whether the parties who made these deposits, having obtained the decree that the order prescribing the lower rates was invalid, are now entitled to have the deposits returned to them. That is the only question, is it not?

MR. BERGE. Yes, your Honor.

MR. JUSTICE BUTLER. Let us assume that the money is returned to one of them, or to each of them. How does that affect any action the Secretary is empowered to take in respect of the rates which were applicable in the period from the commencement of the litigation to November 1, 1937, when the Secretary then changed the order and put in an order which was accepted by the agencies and published in their tariffs? So far as that period is concerned, how does the disposition of the funds, whether they are put up as security or put up to be reimbursed, affect his power?

MR. BERGE. So far as his jurisdiction, his lawful power, is concerned, I do not think it affects it, but the District Court in this case was a court of equity, and this is a suit where equitable considerations should determine. As a practical matter if the Secretary enters an order to correct his procedure, and if that order be upheld, it is going to mean thousands of reparations claims, and it is going to throw the whole situation into practical turmoil, because these commission men need this money, that is, they want the money. Some of them have gone out of business. I do not know exactly how many, but about ten of them have assigned their interests in the fund, either voluntarily or as a result of judgments, and this money will be scattered to the winds if it is paid back.

MR. JUSTICE BUTLER. In order that it may be taken by the reporter, will you cite the provisions of the statute, the act, under which the Secretary claims power to deal with

the rates during the period of litigation, up to November 1, 1937? That is the important question to which Mr. Arnold referred. It is the important question emphasized by the Solicitor General, and it is the important question you emphasize. Am I right?

MR. BERGE. Yes.

MR. JUSTICE BUTLER. Let us have the statutory provisions on which you rely.

MR. BERGE. Of course we do not contend that there is any language which expressly authorizes the entry of an order to correct a procedural defect but we contend that that power is inherent in an administrative body, just as it is in the case of a court to correct a judgment. I shall read the provisions with respect to the Secretary's rate-making power. Section 310 provides that—

“Whenever after full hearing upon a complaint made as provided in Section 309”—

Section 309 provided for the initiation of proceedings on complaints—

“or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative—”

That is, he may act either on complaint, or initiation by himself—

“either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

“(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or

charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

“(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.”

There is nothing said there about the power to correct a procedural defect.

MR. JUSTICE BUTLER. It goes only to the future, I suppose.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. Let me see if I understand your position. You say that this order, having been set aside on the ground on which it was set aside, which I shall say, for short, is that the Secretary did not comply with the statute as to a hearing, argument, and considering the testimony, the Secretary then may take up the matter again and grant a hearing and consider the evidence and make another order, either the one he did make, or increase the old rates, or change it in any way he sees fit to, and make it applicable in the past. Is that your position?

MR. BERGE: I cannot answer that question categorically.

MR. JUSTICE BUTLER. Perhaps my question will enable you to understand what I am trying to find out.

MR. BERGE. I think I understand.

MR. JUSTICE BUTLER. Will you inform me?

MR. BERGE. Our position on that would be that where there had been no rate order ever made——

MR. JUSTICE BUTLER. That is not my question. My question contemplates a rate order in form made and set aside on the grounds on which this one was set aside.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. I am asking you, where do you get power for the Secretary to go back and fix rates between the first of November, 1937, and the commencement of the suit, which was June 14, 1933, if my memory is correct. That is the precise question, and that is the very important question which is presented by your appeal, and which you say will be foreclosed unless you have a stay. I want you to make that perfectly plain to me.

MR. BERGE. Instead of answering the question precisely as you put it, may I state our philosophy, our approach to this thing?

MR. JUSTICE BUTLER. Yes, and after you get through with your philosophy, come to the question.

MR. BERGE. I will try to do it, and try to do it very shortly. But we start out this way, that it was not contemplated by the statute or by Congress that substantive rights should be determined by a procedural slip. We say there must be some way by which the thing can be corrected within the statute, language which is not express as to this sort of situation, but, on the other hand, does not foreclose it. We say that there are several things the Secretary may do. We do not know which one he is going to do. He may undertake to correct the old order, that is, he may grant this hearing, fully hear the exceptions, and then enter an order which is in all terms the same as the old order, and which may be projected either as a validation of the old order, or of the new order. If it is projected as a validation of the old order, I think it could be plausibly argued that under this language which I have read, when there is undoubted jurisdiction, as there was in this case—unquestionably there was jurisdiction of the parties and of the

subject matter—the order would not have been subject to collateral attack, the parties had to abide by it if they were not enjoining it temporarily during the course of the litigation. So that we would say that where there is an order that is voidable rather than void in the sense of the language that was used in the Atlantic Coast Line case, the Florida case, that the Secretary could by according the parties the hearing they had been denied, validate the order. That is one way.

He might issue, after a full hearing, an order that was in some respects different from the old order, correct the findings in some respects after it had been demonstrated to him, after argument, that the old findings were not proper in view of the evidence.

He might make higher or lower rates. We cannot undertake to defend such action until we know whether it is going to be taken. But there might be an order amending or correcting the old order.

On the other hand, perhaps he cannot validate the old order, or might not see fit to do that, might enter a new order as of June 14, 1933. We would say in that case that that is not a retroactive order in the sense in which we think of retroactivity in the case of an ordinary order. It is different from the case where the Secretary would initiate an inquiry to determine whether rates fixed four or five years previously were valid, because such a hearing and an order with respect to a past period would certainly disturb vested rights. Consignors and commission men would have bargained with reference to what they thought to be the true rate, on which they in good faith relied, and to enter such an order is contrary to the policy of the law, and I have no doubt could not be satisfactorily defended, but certainly there is plausible argument for the entry of such an order where it does not disturb vested rights. It does not take anything away from consignors that is now in their pockets, or from commission men. It is not retroactive in the sense that it operates to disturb rights which had been foreclosed.

This money was paid with knowledge that if the rate was 40 cents and the new rate was 35 cents, 5 cents would go into the court, to be held; although the consignors and the commission men knew when the transaction was entered into that the ultimate title to that money was to abide the event, was to be determined after the ultimate fairness and reasonableness of these rates was determined.

MR. JUSTICE BUTLER. Let us get back to the construction of the terms of the deposit.

MR. BERGE. I am setting forth what our argument will be.

MR. JUSTICE BUTLER. You are construing the terms of the deposit to be that they put up security against rates to be made in the future for the safeguarding of fairness.

MR. BERGE. I am trying to state what would be the basis of our argument if this case were fully heard. So we say that the order in practical effect, far from being a retroactive order to disturb vested rights, operates on this fund, and in that sense it is prospective in operation, because it determines to whom this money will be paid.

MR. JUSTICE BUTLER. When you say it operates on the fund, you have to go back again to the conditions upon which the deposits were made, do you not?

MR. BERGE. Yes. I see that your Honor's mind recurs to that question.

MR. JUSTICE BUTLER. I am emphasizing the importance of the question I first asked: On what condition was this money paid into the court? Has the condition been met, has it been complied with?

MR. BERGE. We want a chance to argue as strenuously as we can to the Court that that condition has not been met.

MR. JUSTICE BUTLER. What was the condition? What do you say the condition was on which the money was deposited?

MR. BERGE. The money was deposited until there had been a determination of whether or not the Secretary acted within his power and with reference to the evidence.

MR. JUSTICE BUTLER. Will you tell me the basis of that statement? Surely it is not contained in the order for the deposit which you read.

MR. BERGE. No. I say in the first place that it was undoubtedly in the minds of the parties and that a court of equity should try to project itself into that situation. On the other hand if we are to look deeper than what must have been in the minds of the parties let us look at the language of the decree, which is, "until the termination of this cause", and I think that the legal and technical arguments are absolutely sound that this cause has not terminated until we have had an appeal from this order of distribution. We contend that follows from the language of this Court. (

MR. JUSTICE BUTLER. Let me ask you another question. Suppose Mr. Morgan receives his fund pursuant to this order and the Secretary goes on and takes action such as you suggest. Would not Mr. Morgan be liable for the difference just the same as if this money remained in the court?

MR. BERGE. I think that likely he would be liable.

MR. JUSTICE BUTLER. So that, so far as legal liability is concerned—I am not considering now multiplicity, and so forth—the order making restitution of the deposits cuts no figure. Am I right?

MR. BERGE. Do I understand your Honor's question to be this, whether or not the money is refunded to the commission men at this time, the Secretary may still go ahead and hold a hearing and make a new order?

MR. JUSTICE BUTLER. That is, the return of the money will not affect his power, nor would it affect the liability of Mr. Morgan to make restitution of collections he has made over and above the rates finally established to be fair, just and reasonable.

MR. BERGE. I think not, although that presents undoubtedly a question. Let me say, without committing myself, that if that return is made, and the appeal—

MR. JUSTICE BUTLER. It would not affect the Secretary's jurisdiction.

MR. BERGE. No; but it might take one of the props out of the argument that this order does not disturb the equities. This is primarily, we think, an equitable situation. Certainly it would be more equitable to have an order operate on the fund rather than to operate on these parties after they got the money back. I suppose that technically it does not disturb the Secretary's power.

MR. JUSTICE BUTLER. Nor does it destroy the liability of the commission men, of the agencies. The restitution of this money to Morgan, we will say, to illustrate, would not affect the Secretary's jurisdiction under the statute at all to do whatever he is empowered to do with the rates in that period of time.

MR. BERGE. There is this trouble—

MR. JUSTICE BUTLER. Just a moment. Nor would it affect the liability of Morgan to serve for reasonable charges, would it?

MR. BERGE. The question of the limitation period, if reparation charges enters, because there is a 90-day limitation period.

MR. JUSTICE BUTLER. Is this a reparation proceeding?

MR. BERGE. Oh, no.

MR. JUSTICE BUTLER. Can the Secretary initiate a reparation proceeding?

MR. BERGE. No; but so long as this money is held in a court, the cause of action in a reparation proceeding presumably does not accrue to the shippers, and once the money is paid out to the shippers—or I should say to the commission men—the limitation period commences to run, and I suppose that if this money is paid to the commission men, the other side would argue that that was now the procedure to determine this question.

If the courts have any control of this situation at all, I should think it would be far preferable to have the ultimate right to this money determined in a suit to enjoin whatever order the Secretary now may make, rather than to have it tested in a multiplicity of reparation suits.

It is argued, I think, that there is no right to reparations here, but we squarely take issue on that, because we think that unless the money goes back to the commission men, the whole question of the right to the money could be determined in many suits, and there would be no doubt thousands of them, claims filed with the Secretary.

MR. JUSTICE BUTLER. You say that Morgan would still be liable to these shippers?

MR. BERGE. In a reparation proceeding.

MR. JUSTICE BUTLER. In some proceeding, even though he got his money back, that the restoration of the fund would not deprive these shippers of their cause of action?

MR. BERGE. Yes, we would say that. Let me call attention to another section of the statute. Your Honor asked me a few moments ago about the provisions with reference to the Secretary's rate-making power. There is another provision. Quite independently of the Secretary's rate-making power, it prohibits the collection of unjust, unreasonable and discriminatory rates; by the provision in section 305, which is quite apart from the Secretary's power. That section provides:

"All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful."

The District Court has twice held that the rates prescribed by the Secretary in this order were just and reasonable; they adopt his findings as their own.

MR. JUSTICE BUTLER. Was that issue before the District Court?

MR. BERGE. Oh, yes, absolutely.

MR. JUSTICE BUTLER. Whether the rates were just and reasonable?

MR. BERGE. In this way, that they had before them the review of the Secretary's order, and there is Equity Rule 70½, which requires separate findings of the District Court.

MR. JUSTICE BUTLER. Would the District Court have jurisdiction to find that the rates prescribed by the order were too low or too high?

MR. BERGE. Not to substitute its judgment for the Secretary's.

MR. JUSTICE BUTLER. The only issue before it was whether the order was a valid one.

MR. BERGE. The District Court held that the Secretary's order was before it by substantial evidence. It proceeded, albeit erroneously with respect to its jurisdiction, to determine that the rates were supported by the weight of the evidence.

MR. JUSTICE BUTLER. You are not relying on that?

MR. BERGE. Except to this extent: I think that the District Court has the right, in fact the duty, to make separate findings of fact and the District Court in making findings of fact to support its order adopted the Secretary's findings as its own, and expressly reaffirmed certain of them. The total effect is that this District Court has found that the old rates were unjust and unreasonable. I am not contending that the cause of action could be based on that in a separate reparations suit, but I am contending that the fact that the only determination on the merits that has ever been made has been one in support of the Secretary's order is certainly going to give great impetus to independent claims against these commission men, and that the Department of Agriculture is going to be jammed up with these things, and the courts ultimately, on judicial review, and from the standpoint of sound procedure, administrative and judicial, it would be far better to have a determination on the merits in a proceeding in which this hearing point was removed. It is not contrary to the statute, it is exempted from the ordinary principle against retroactivity,

because of the peculiar circumstances in this case, and it can be done without disturbing independent substantive rights without being unfair to anybody. We cannot attempt now, certainly the Court would not do it and Government counsel would not undertake to attempt, to foreclose the form of order the Secretary may enter. Of course theoretically he might enter an order dismissing the proceeding, and there would be nothing more to it.

MR. JUSTICE BUTLER. He might take no action.

MR. BERGE. That is within his power.

MR. JUSTICE BUTLER. And the fund would remain where it is.

MR. BERGE. No, the fund would go back to the commission men.

MR. JUSTICE BUTLER. Let me understand. How long should this fund remain where it is, according to your view?

MR. BERGE. A reasonable time, to permit correction of the error. Let me say, in regard to that, that this order reopening the procedure was entered on the 2nd day of June, and the Secretary allowed 30 days for the taking of exceptions to the order which he served, and he proposed to go right ahead and hold a hearing, and the thing undoubtedly would have been decided this summer. Opposing counsel asked an additional period within which to file the exceptions to the proposed order, and the Secretary granted an extension until August 15. That was at their request. The Secretary has shown every indication of good faith and promptness, and proposes to go right ahead and determine this question as soon as possible. Knowing how those things operate, and the great desire to get this controversy settled, it is a reasonable prognostication that whatever order he enters will be entered in the early fall, probably in the month of September.

MR. JUSTICE BUTLER. It is contemplated that the parties shall have a right to introduce testimony?

MR. BERGE. It is not, but they can request it if they want to. I think the form of the order of the Secretary leaves that door open. He says:

"It is further ordered that said market agencies, if they file exceptions to said tentative findings of fact, conclusion and order."

MR. JUSTICE BUTLER. What were the tentative findings of fact, conclusion and order?

MR. BERGE. The same as the order contested.

MR. JUSTICE BUTLER. That is, he now serves what was his final judgment on the facts and the merits of the controversy upon the parties as tentative to the end that they may argue before him and call upon him to give the hearing which it was held he did not give. Does it also contemplate that they are free to bring in evidence to show whether they made or lost money during this litigation?

MR. BERGE. That is open to them in this language of the order:

"In accordance with the rules of practice adopted by the Secretary of Agriculture, governing the procedure in such cases, and within which to make any appropriate motions or objections with respect to further proceedings in this case."

Again, we cannot forecast what his action will be, but I am sure I can say that if they make such a motion and have the opportunity to introduce additional evidence, the Secretary will hear them. We did not invite them to do it. Our Honor is fully familiar with our theory, that the application of these orders is not a test of their fairness, that that these specific findings are to be judged with reference to the evidence in the record. There is no confiscation of property which entitles them to a hearing de novo in court.

MR. JUSTICE BUTLER. Assuming the Secretary has jurisdiction, as he claims, would testimony as to the result on their business be material?

MR. BERGE. I do not think so.

MR. JUSTICE BUTLER. You would object to their introducing evidence?

MR. BERGE. I cannot speak for the Secretary of Agriculture on that, but I think the disposition of the men in the Department of Agriculture, and the Secretary, would be to let them put in anything they wanted to.

MR. JUSTICE BUTLER. But you would say it was immaterial?

MR. BERGE. I would argue that on judicial review.

MR. JUSTICE BUTLER. You would say, let it in, and then regard it as immaterial?

MR. BERGE. I do not know whether the Secretary would regard it as immaterial or material, but I would argue that it was immaterial as a matter of law.

MR. JUSTICE BUTLER. That would be on the ground that the Secretary had ordered rates applicable in the future, and that after a lapse of time the actual experiences could not be substituted for the forecast?

MR. BERGE. No, that would not be the reasoning.

MR. JUSTICE BUTLER. Why do you think it is immaterial, then?

MR. BERGE. Exactly on that question I would say they had the right to do it in a confiscation case. I say it is not material here because I think the principle of market agency rate-making, which this Court has upheld—although I may be wrong—excludes as criteria the number of agencies which may be put out of business.

MR. JUSTICE BUTLER. I was not speaking of that at all; I was taking the case of a single man, say Morgan.

MR. BERGE. I do not think you can tell whether these rates are fair or not by considering whether Morgan makes money. He may make a lot of profit and may not make any; but that goes to the substantive merit of the argument, and the courts are always free to take a different slant on that. I think this Court's decisions in the Acker case and the Corrick case would support my view. I would person-

ally say that new evidence as to the application of the rates to Morgan or to many of them would not cast any helpful light in determining the merits of the case.

In the brief that was filed in this case on the merits there were large tabulations with respect to the application of these rates to different periods, and your Honor will recall that we tried to answer those, and we would make the same argument again, that they did not prove anything. But I think that the Secretary, irrespective of the mistakes he has made in this proceeding, has never denied these parties opportunity at any stage to introduce evidence. One rehearing was granted. The first examiner's hearing lasted for two and a half months, in 1930. The second examiner's hearing lasted a couple of months, in 1932, and the hearing was reopened in 1932 after an order had been entered because they wanted to put in evidence on changed economic conditions. I do not think the Secretary would take any technical view, but we think the defect which this Court found controlling of the old procedure could be adequately corrected by a hearing with reference to the old evidence.

As I understand this Court's reasoning, one of the objections to the procedure was that parties never had an opportunity to be fully apprised of what the order would be, hence they could not intelligently argue to the point because they did not know what was being held against them. We grant them that opportunity. We think that would comply with what your Honors have held to be the controlling authority here. But the door is open for the making of appropriate motions, the taking of new evidence, or anything else.

Certainly we cannot forecast error on the part of the Secretary in denying any such motion. We may assume he will act fairly on it, and if he improperly denies the motion—and I think he is going to be careful the next time—if he improperly denies the motion, that would invalidate the proceeding. We cannot forecast or assume that there will be error again, nor can we forecast the precise form

of order he will enter. We think there ought to be, and it is consistent with the statute that there is, a means for correcting an anomalous situation like this. We do not think that Congress ever intended or that the courts like this sort of result, whereby the title to \$600,000 in money is determined by a fortuitous slip, a serious one, no doubt, but one where the trouble can be corrected without doing anybody any harm. If we are wrong in that, the Supreme Court can determine it, and we will have a guide for future action, administrative or legislative.

This appeal can be heard early this fall. The Government will be willing to expedite it, willing to have it put on at the fore part of the session, if the Court desires. The Secretary has moved promptly. This money has been there for five years; and the payers are not having to pay any more in. There are substantive questions of public interest, and even though we are wrong on the merits, let us have a decision of the Court that will conclude this question, a question on which, for sufficient reasons, it was felt the record was inadequate to conclude when we petition for rehearing.

We moved promptly, and this appeal is on the way.

MR. JUSTICE BUTLER. You applied for a stay to the statutory court?

MR. BERGE. Yes. They turned us down. They allowed the appeal, and denied our stay, and that is why we are here.

MR. JUSTICE BUTLER. On what ground did they deny it?

MR. BERGE. I do not think anything was stated.

MR. JUSTICE BUTLER. Did they file a memorandum?

MR. BERGE. I do not think so.

MR. JUSTICE BUTLER. Does not your petition contain their memorandum?

MR. BERGE. Yes, it does, but I could not recall what they said, at the time your Honor asked me.

MR. JUSTICE BUTLER. What ground do they give?

MR. BERGE. I have the language here.

MR. JUSTICE BUTLER. They heard you?

MR. BERGE. This is what happened. We had an argument at Kansas City on June 11, just eleven days after the decision, on the motions with respect to distribution. We had moved to stay and the other side had moved for distribution, and I went out and argued that. The court took it under advisement. About two weeks later they rendered their decision against us, and entered their order for distribution, from which we are appealing. We immediately wired the United States Attorney and asked him to apply for a stay. We did not have much time. None of us went out. The United States Attorney went in and applied for a stay. I am unable to say what arguments were made. I do not know as to the fullness of the argument, but of course the District Court was by that time fully apprised of our situation and the argument in support of the application for stay would no doubt have been substantially the same as the argument I had made in opposing the distribution. But we just got a reply that the stay had been denied, and the court signed the order allowing the appeal.

MR. JUSTICE BUTLER. I wanted their reasons.

MR. BERGE. All I can give you on that is this order, in which, after making the recitals—

MR. JUSTICE BUTLER. I thought they had a separate opinion.

MR. BERGE. There is an opinion, but that opinion was delivered at the time the order of distribution was entered.

MR. JUSTICE BUTLER. No, I mean an opinion on the stay. Was there an opinion on the denial of the stay?

MR. BERGE. No. The opinion your Honor has in mind was the opinion they rendered when they entered the order of distribution, and before we had asked for a stay. If there was an opinion, we have never received it; but I am quite sure there was not.

MR. JUSTICE BUTLER. I have before me a document starting in this way:

"Per Curiam.

"The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution."

That is the document to which I referred.

"These matters arise in the manner now to be stated."

MR. BERGE. That, your Honor, is the opinion that was rendered when the court entered the order from which we are appealing, the order of distribution. That was about June 18, when they handed down the memorandum opinion, and denied our motion.

I see what is troubling your Honor. The language is confusing. We call our motion that was argued a motion for a stay of distribution of the funds. The other side called its motion a motion for immediate distribution. Those two motions were put up to the court and this opinion was the result. It is an opinion and an order ordering the distribution. We applied for a stay of the order ordering distribution. The confusing thing is that we called our motion at that time a motion for stay of distribution. The thing which was denied subsequently was a motion for stay pending appeal.

MR. JUSTICE BUTLER. You made a motion for stay after the appeal and pending the appeal.

MR. BERGE. We asked the United States Attorney to.

MR. JUSTICE BUTLER. What is there here in the record, what is in this Court now, what has been filed in this Court? Was the case brought here and docketed?

MR. BERGE. It is on the way up.

MR. JUSTICE BUTLER. Why have you not filed your papers in this Court so as to show what is before it?

MR. BERGE. The record has not come up, and the District Court has not the record here yet, but we understand

that is not a requisite. We have filed copies of all the appeal papers with the Clerk. We have filed with you the petition for an order.

MR. JUSTICE BUTLER. You have filed your appeal in this Court. Have you filed anything in the Clerk's office here?

MR. BERGE. We have filed these motion papers.

MR. JUSTICE BUTLER. You regarded these motion papers as addressed to the Court, apparently.

MR. BERGE. Yes, and we are willing to amend that. We did not understand they had to be addressed personally to you. We had addressed them to the Court, and we made these informal arrangements to present the matter to you. We will amend the papers so as to address you.

MR. JUSTICE BUTLER. I may be wrong, but as I understand it, the District Court had power to stay the order superseding.

MR. BERGE. Oh, yes.

MR. JUSTICE BUTLER. As I understand it, any Justice of this Court has.

MR. BERGE. Yes.

MR. JUSTICE BUTLER. And as I understand it, this Court has.

MR. BERGE. That is our understanding.

MR. JUSTICE BUTLER. This Court is not in session, and I happen to be the Justice for that circuit, and I assume I have the power. I prefer not to exert the power until the papers are filed, so that we may know what the decree assailed is, and all the proceedings underlying that. They should be filed with the Court. Then you come to me for the application, and I will hear you. My action is not final. If I deny your application, you can go elsewhere.

MR. BERGE. I may say, in respect to that, that the time when the appeal is docketed is not in the appellants' control, at least that has been my experience in the making up of the record by the District Court. It is summer time, and those things proceed slowly. There should not be a

long record, and we are doing everything we can to expedite it. But my experience in these other cases we brought up has shown that we have to wait on the District Court. I do not know how soon this appeal may be docketed. We will do everything we can to expedite it. But I suppose there is no way to file our appeal until the record comes up. We will exert every effort to get it here promptly.

Then do I understand that there could be no action on this application until the record is here?

MR. JUSTICE BUTLER. I have not so ruled.

MR. BERGE. I just wanted to be sure.

MR. JUSTICE BUTLER. I want to emphasize that I very much prefer that the papers be filed before I pass upon the question.

MR. BERGE. Let me ask this. The District Court entered this order denying our stay on the 30th of June. We were advised informally that they would give us a reasonable time in which to seek this hearing before you.

MR. JUSTICE BUTLER. You told me that, when you called me up, and I asked you if there was any urgency about it.

MR. BERGE. We had informal assurance and we were confident that they would not act in the interim. But could some kind of an order be entered staying the action until the appeal papers get here? I presume we could again get some sort of informal assurance.

MR. JUSTICE BUTLER. We will hear what the other side have to say about it.

MR. BERGE. Would your Honor care to hear this order denying the stay?

MR. JUSTICE BUTLER. Yes.

MR. BERGE. They say:

"And whereas, on this the 30th day of June, 1938, said petition has been duly presented by counsel for appellants and counsel for appellees have appeared in opposition thereto and this Court has heard arguments of counsel for appellants in sup-

port of said petition and arguments of counsel for appellees against the sustaining of the same and the Court being fully advised in the premises; and having duly considered appellants' petition, finds that appellants' petition is without merit and should be overruled;

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said petition of the appellants be and the same is hereby overruled and exception is allowed appellants."

MR. JUSTICE BUTLER. Two things have troubled me very much about this. The first is to find the condition under which the money was put in court, and the second is what has happened since with reference to the staying of proceedings pending appeal.

MR. BERGE. All they do is recite the application for the stay and deny it.

MR. JUSTICE BUTLER. They went into the merits of it and said there was no merit in your opposition to the distribution of the funds.

MR. BERGE. Yes, but that is the order from which we are appealing.

I may say just this, I notice in the memorandum filed this morning, which I have not had time to read, the memorandum of our opponents—

MR. JUSTICE BUTLER. I have not seen any memorandum.

MR. BERGE. It was just handed to me.

MR. JUSTICE BUTLER. I thought I had one from you. By the way, under what section of the Judicial Code is this appeal taken? You say the absolute right is given for the appeal by the Code, and so forth, but you refrain from citing the section. I should like to have you read the language.

MR. BERGE. May we find that while our opponents are arguing?

MR. JUSTICE BUTLER. Yes. It is the appeal from the order in the main suit.

MR. BERGE. We say that it is the same section applying to the case of Baltimore & Ohio Railroad against the United States, in which your Honor wrote the opinion, reported in 279 United States Reports, and that that is conclusive as to our right.

MR. JUSTICE BUTLER. I thought you perhaps relied on that, but there was nothing I found in your memorandum to indicate it.

MR. BERGE. I am sorry. We have our statement of jurisdiction under Rule 12, of which we filed a copy with the Clerk, which we hoped would be given you.

MR. JUSTICE BUTLER. What does it cite?

MR. BERGE. It cites the Baltimore & Ohio case, and one or two other cases. Our primary reliance is on the Baltimore & Ohio case, and I presume your recollection is fresh on that and it is not necessary to go into it. We think that is conclusive. I read the last sentence in the decision of the Court on the petition for a rehearing:

"What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide."

We think it is implicit in that that there must be an appeal from the decision of the District Court.

MR. JUSTICE BUTLER. Some rulings of the District Court are final in some cases.

MR. BERGE. Yes, but here is a case——

MR. JUSTICE BUTLER. I am not saying this is one. I was just drawing attention to the scope of that statement.

MR. BERGE. This is a case where it seems to us the court refused to pass on that question because the record

was inadequate, and it is a final order, I think, in the sense that it is appealable, and certainly it is the order which goes to the heart of the whole matter in litigation, as to who gets the money.

MR. JUSTICE BUTLER. I do not see that at all, that it goes to the whole heart of the litigation. I have understood you to say here this morning that the jurisdiction of the Secretary is not affected by the order of restitution, nor would the liability of the agencies be affected. You suggest with much emphasis, and I will say with great force, that nevertheless it ought to be stayed; but to say that it goes to the heart of the question I think is overstating your own position.

MR. BERGE. Let me suggest it this way, that this Court in the last paragraph of the opinion of May 31st, declined to pass on the question of who should get the money.

MR. JUSTICE BUTLER. That question was not here.

MR. BERGE. That is correct, but you added that that was a question for the District Court to determine.

MR. JUSTICE BUTLER. That was in the hope that you would understand it.

MR. BERGE. I hoped we had.

MR. JUSTICE BUTLER. We said it was not for us, in the hope that you would understand it and take it to the court below; but to build any case upon that statement is futile.

MR. BERGE. We are not building on that.

MR. JUSTICE BUTLER. To use the forcible language of the Chief Justice, that would be idle.

MR. BERGE. I hope I have made clear that we are not building it on that alone, but we do think this Court contemplated the possibility that the Secretary may take action, and because of all of that, this is a decree of the District Court entered in this proceeding, and before the cause is terminated we ought to have our right to argue our appeal, and it is only just and fair that the money be held pending the final disposition of the case.

**Argument of Mr. Thomas T. Cooke, on Behalf of the
Appellees**

MR. COOKE. At the outset I will give your Honor a copy of our memorandum, which contains a copy of the opinion of the lower court.

MR. JUSTICE BUTLER. You are appearing for whom?

MR. COOKE. I am appearing for the market agencies. It is our position that what the Secretary proposes to do, or may do, has nothing to do with the release of these impounded funds, and that the terms of the temporary restraining order are, as the lower court said, susceptible of no other interpretation than that the funds should be released, as they were released by the order of the court which it refused to stay.

The terms of the temporary restraining order, except for the proviso, have not been read to your Honor, and with your permission I should like to read them. I read from page 127 of the record in the Supreme Court on the main appeal, in which the temporary restraining order filed July 22, 1933, was printed. In the third paragraph it says:

"That petitioner has an established business as a market agency, registered under the Packers and Stockyards Act, 1921, engaged in the sale and purchase of livestock for others at the Kansas City Stock Yards, in Kansas City, Missouri, and that if such temporary restraining and stay order suspending the enforcement of said Order of the Secretary of Agriculture"—

That is, the June 14, 1933 order—

"is not granted, the defendants will, before the hearing upon the application for temporary injunction as prayed in said Petition"—

That is, the petition to set aside—

“have it within their power, and they will, proceed to enforce the penalties provided for violation of said Order by the Packers and Stockyards Act, 1921, and will institute a multiplicity of suits against the petitioner, on each of the grounds of supposed violation aforesaid and otherwise proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said Order the petitioner would be unable to collect from the users of its service the differences between the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States.”

I have read all the parts of that order except the proviso, which has been read, which have any bearing on the purpose for which these funds were deposited. The lower court said:

“The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.”

The phrase to which your Honor has called attention, and which my learned opponent construed as meaning that the Secretary shall have an opportunity to make a new order, is "dependent on the outcome of the cause", or words to that effect. "The cause" can be only one thing. The cause is the cause we brought to set aside the order of the Secretary. When that order is set aside, it is very plain that the cause is terminated. It is also very plain, under the terms of this order as I read them, that under no condition, as your Honor has suggested, can these funds be turned over to the consignors or the shippers. They are deposited as security that the commission men will make restitution in the event they should lose.

Before taking up a brief chronological statement or history of these rates, and so forth, I should like to say that we do not feel the same way the Government does about this stay doing us no harm. After all, the interest at 6 per cent. on \$600,000 is \$3,000 a month. We have been deprived of these funds for five years, or such of them as were impounded from time to time. During that time one-third of the market agencies have gone out of business. In this record in the Supreme Court affidavits were filed to the effect that inability to get at these funds drove quite a few of these agencies out of business. So that we feel that a good deal depends upon whether or not a stay is granted.

Secondly, as your Honor has well suggested, the determination of any great administrative question has nothing to do with the distribution of these funds. That can be determined, if there is such a question, whether or not these funds are distributed.

Counsel has spoken about the lower court finding that the rates were reasonable as fixed by the Secretary.

MR. JUSTICE BUTLER. You need not trouble about that. That question was not before the lower court, and if they said anything about it, it was obiter, and you need not regard it.

MR. COOKE. Very well. Coming back to the temporary restraining order—and, as I have said, we feel the whole thing depends on that, that what the Secretary proposes to do is not properly a matter in this record—of course, the statutory court has no control over what the Secretary does. What the Secretary proposes to do in making a nunc pro tunc order the lower court says has no shred of reason to support it; yet as a court, as a judicial agency, they cannot direct the Secretary in any way. I understand that has been universally the Government's contention, that their power is only a revisory power.

Three cases are relied upon by the Government in their jurisdictional statement. One is the Morgan case.

MR. JUSTICE BUTLER. That is, on the question as to whether it is appealable?

MR. COOKE. Yes. We take the position that it is not appealable, that the Supreme Court has no jurisdiction. Secondly, that the questions raised are utterly frivolous.

MR. JUSTICE BUTLER. Put that question aside, the question of whether they are frivolous or not. The question of appealability will be argued.

MR. COOKE. That is what I am going to talk about. They rely upon three cases. One is the Morgan case, and, as your Honor has just said, the short expression of opinion upon the denial of the petition for rehearing can have no bearing on that.

MR. JUSTICE BUTLER. That has no bearing. The denial of the petition for rehearing in the Morgan case has no bearing on the question, in my judgment. So you need not trouble yourself about it. What did the mandate require?

MR. COOKE. The mandate required that the lower court take proceedings in conformity with this opinion.

MR. JUSTICE BUTLER. Why does not the Baltimore & Ohio case construction of the statute governing appeals from three-judge courts apply here? I will put it this way; is it perfectly plain and obvious that it does not?

MR. COOKE. I think it is, for these reasons. Your Honor in that case mentioned three reasons why that order was appealable. Of course, what happened was that the case went back to the statutory court upon a reversal. The statutory court had held that the east side roads had to absorb, as I remember, the charges across the Mississippi River from East St. Louis to St. Louis, which was in favor of the west side roads, and the Supreme Court reversed. When the case came back to the statutory court they refused to allow restitution in favor of the east side roads. The Court, speaking through your Honor, said that the case was appealable, and gave three reasons. The first of those reasons, as I understand, was that the order compelling the west side roads to make restitution to the east side roads amounted to a decree at the end of an equity suit. We think that our order releasing these funds, from which the Government appeals, has no such characteristic. We think it is a simple order of court, or a direction to the clerk to release these funds, that upon the decree of the lower court coming down permanently enjoining the Secretary from enforcing his order, declaring it null and void in accordance with the mandate of the Supreme Court, we became automatically entitled to these funds which we had deposited as security, although doubtless the clerk would not release them without an instruction from the court; but we feel that the so-called order of the court is nothing more than an instruction to the clerk, particularly in view of the fact that the temporary restraining order, pursuant to which these funds were impounded, is not in the least ambiguous or susceptible to any construction under which the consignors could ever get these funds.

Therefore we say that this order is not at all equivalent to an order compelling one of the parties to make restitution to the other party. We feel it is an order of which they did not even have to have notice, that it is an *ex parte* order to which we automatically become entitled.

The second basis of the holding in the Baltimore & Ohio case as I understand it is that if the lower court did not carry out the mandate of the Supreme Court—and it did not in that case, because the reversal, as your Honor says, in the opinion, necessarily carried with it right to restitution—either appeal or a mandamus would lie to the Supreme Court.

In our case we feel that if the Court should refuse this order of release, releasing these funds, they would be acting directly contrary to the mandate of the Supreme Court, and not in conformity with it. So that the second reason does not apply.

The third reason was that the restitution proceedings were an incident of the main proceeding. In our case it seems to me that much the same reasoning applies to dispose of that as I mentioned as disposing of the second reason, that is, that this is an automatic release to which we are entitled, and to hold these funds awaiting an order of the Secretary cannot possibly be an incident of the main suit. It is contrary to the purpose of the main suit, which was to set aside the Secretary's order, and get back these funds which we deposited as security. That, I think, disposes of the Baltimore & Ohio case.

There is only one other case they mentioned, and that is a very complicated set of facts in the Atlantic Coast Line against Florida case, also mentioned in the cases they put in their jurisdictional statement as those on which they rely.

I do not think I ought to take your Honor's time—I have discussed it in the memorandum—to discuss the very complicated facts in that case, in which the Court split five to four, but as suggested in our memorandum very clearly, if the case has any bearing at all, which I very much doubt, taking either the majority opinion or the dissenting opinion, there is nothing in them which in any way aids the Government's contentions.

There are a couple of things which I should like to say about that case. For instance, Mr. Justice Cardozo in the

majority opinion mentioned the fact that it is not even contended—and this bears on something about which your Honor inquired—that between the time when the first order was made in that case, which the Supreme Court held invalid for lack of basic findings of discrimination, and the second order, which, by the way, was made upon new evidence and new findings by the Interstate Commerce Commission, that it was not even claimed that there had been any change in conditions.

I hardly think my friends will claim that there was no change in conditions during the years 1933 through 1937 which would make an order entered on the 14th of June, 1933, this *nunc pro tunc* order which the Secretary proposes to make—that would make it effective to award reparations, which he admits he is trying to do, for that period of five years. Certainly your Honor will take judicial notice of the fact that livestock prices varied greatly during that period, that the efforts of the administration were to raise prices, and the consequence is that that does not apply to this case at all.

In the Atlantic Coast Line against Florida case the majority found that the intrastate rates set by the Florida commission were confiscatory. In other words the Interstate Commerce Commission in that case forced the railroad to collect higher rates. They had to comply with the order, which was sustained by the statutory court, and Justice Cardozo, speaking for the majority, expressed the opinion that whatever the legal rights were, the equities were against compelling the railroad to disgorge and Mr. Justice Roberts, writing the dissenting opinion, felt that because the order was entirely invalid during the period, they should restore the moneys they had collected during the period when the order had been presumably in force. So much for the cases cited by the Government, none of which I think has any bearing at all upon the present situation.

I assume that the Government takes the position that as a matter of right they were entitled to a stay of the dis-

tribution of these funds, because it does not make any difference which side of the picture you look at, the denial of their application for a stay or the granting of our motion for a release amount to the same thing. The Government has not appealed from the denial of their motion for a stay, evidently realizing that they could not possibly claim this as a matter of right, that it must be at the most discretionary. In their jurisdictional statement they have nowhere stated any grounds of abuse of discretion, if it was a discretionary matter instead of a mere ministerial act by the court.

I do not know whether I can clear up a matter inquired into by your Honor, but what happened, first, in the statutory court, after the mandate came down and the decree was entered on the mandate permanently enjoining the Secretary, was that the Government by petition applied for a stay of distribution, and we made our counter-motion for release, and the court's opinion, the per curiam opinion, which your Honor has read, is directed to both those motions. It says at the end that it disposes of both of them.

The Government had their appeal allowed. They filed appeal papers below, and they had their appeal allowed, and they again applied for a stay of the operation and effect of this order of the statutory court granting our motion to release the funds and the supersedeas.

I do not conceive that a supersedeas would do them any good, because it seems to me it is just like a situation where a court refuses a temporary injunction. There is nothing to supersede. This is not a decree or a judgment upon which execution issues, which execution can be stayed. I conceive that what they really want is a stay injunction, and not a mere stay of the operation and effect of this order. I may be wrong about this, but if the operation and effect of the order were stayed, I do not know how they could appeal from it.

It seems to me that the whole case, therefore, rests upon the terms of this temporary restraining order and the lack

of appealability. They assimilate it to a final order or decree under sections 44 and 47-a of the Judiciary Act.

Passing on to what I think is immaterial and I think is not properly part of this record, what the Secretary proposes to do, that seems to me to be a very strange thing he proposes to do. The day after the Supreme Court denied his petition for rehearing—and I assume he had not been reading the record prior to that—he served us with tentative findings and with an order reopening the proceeding, which order is annexed to the petition for the stay below. These tentative findings of fact are issued as of June 14, 1933. They are in precisely the same form as the findings, conclusion and order which the Supreme Court held to be wholly invalid as the result of fatally defective hearings, because of private consultations with subordinates, among them the prosecutors in the case, and because of lack of notice to the market agencies of the claims of the Government.

Counsel has spoken of his idea that the Secretary will allow us to introduce new evidence and your Honor suggested that, I take it, in connection with the obvious conclusion that this is a reparation proceeding, although no petitions for reparations are claimed to have been filed, and the statutory limitation is 90 days.

MR. JUSTICE BUTLER. The other side does not claim this to be a reparation proceeding.

MR. COOKE. Yes.

MR. JUSTICE BUTLER. I mean orally. Mr. Berge said it was not a reparation proceeding, and that the Secretary had no jurisdiction to initiate one, as I understood it.

MR. COOKE. But in writing he claims that it amounts to the same thing. He says on page 9 of his memorandum—

MR. JUSTICE BUTLER. I ignore the writing and take him on his statement here, so you need not spend time on that.

MR. COOKE. What I am saying is that the attempt is to award impounded funds to consignors which have been impounded between June 14, 1933, and November 1, 1937.

MR. JUSTICE BUTLER. Is not this the attempt, upon being informed that the Court held there was a lack of the statutory hearing required, the Secretary thereupon prepared the document to which you have just referred as of the date of his original finding, and served on the other side that which should be termed his final findings of fact and order, to be tentative, to the end that you could now have the hearing which the Court said you did not have, and there is language in some of the papers submitted on this application by the Government to the effect that he may make an order now, after hearing argument and considering the evidence, *nunc pro tunc*, that is to say, to have the same effect as if it had been made in the first place. With the greatest hesitation I say that is what they are telling us here today that they are considering doing.

MR. COOKE. Oh, yes, that is right.

MR. JUSTICE BUTLER. So it is not a proceeding for restitution. Then they say that even though restitution were made, he would still have jurisdiction to do the same thing, and that each of the depositors now claimant for the fund would be unaffected as to liability by it, but they add that the situation is such there would be these funds made up of innumerable transactions, and that would involve a lot of suits or applications. I think he said it would glut the department. Evidently there would be a good many claims if that thing were held valid. So does it not get down really, in the last analysis, to this: First, is this an appealable order? You say it is not: they say it is. I think it is not clear, and I will not decide that it is not appealable. I will assume that it is, for the purpose of the argument.

I will assume, further, that the Secretary's jurisdiction would not be affected by the restitution, and that the liability of Morgan and the other claimants would not be

affected, and that gets to the narrow question of whether these contentions are so slim that in passing on an application for a stay I should so say, and deny it. Your argument against that is that this is a lot of money, and that the interest on it is so much.

MR. COOKE. They did not offer to give a bond.

MR. JUSTICE BUTLER. It is divided among 50 or 60 people, is it not?

MR. COOKE. Yes.

MR. JUSTICE BUTLER. They are very emphatic in their idea that there is presented here a great question upon which the Court ought to pass. I think they have failed to make out that if I deny the application, I am passing upon that question.

MR. BERGE. I want to say just a word about that later. I have one more thought on that.

MR. JUSTICE BUTLER. Narrowed down to that, I will hear you further, Mr. Cooke. There is no use talking about things about which agreement is pretty well reached.

MR. COOKE. The court below, as perhaps your Honor has noticed, stated:

"We consider that the motion of defendants has not the faintest shadow of merit."

They further say that they would consider it an act of bad faith not to restore these funds which were impounded upon the express understanding that they should be released dependent upon the issue of this cause.

"We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act autho-

rizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed 'after full hearing' (and there has been no such hearing), and that when they have been so determined and prescribed they shall 'be thereafter observed.' "

On the Secretary's theory, where is he now? He has served us with tentative findings—that is, assuming he could reopen this proceeding—and a proposed order. He is in the middle of the proceeding. He may make an order some time in the year 1938 let us say. He wants to take that back to June 14, 1933. The statute says he can only make an order after a full hearing. Surely the hearing is not complete at a time when he has just served us with tentative findings of fact. Surely it was not complied with five years before this time, that is, June 1 of this year, and surely the rates he will fix as a result of any order he may make nunc pro tunc as of that date are not rates thereafter to be observed.

In other words he is trying to award reparations. I must come back to that because it seems perfectly clear to me he is not proceeding under the reparation sections, because no reparation petitions have been filed, and he cannot act on his own motion, but he is trying to do the same thing by a nunc pro tunc order which is expressly in the teeth of the statute, because the order can only be made after a full hearing.

If the claimants should resort to reparation proceedings, assuming that their claims are not barred, as they clearly all are, because six months has elapsed since these rates were superseded, in November, 1937, and I have never heard that any reparation claims have been filed; assuming he could award reparations, as the public representative, as the Government says, of the shippers, of course he would

have to take into account the reasonableness of these rates we were charging at the time of the particular transactions in which reparations are claimed. Those are tort claims, of course. What they are trying to do is to hold this money as security for tort claims which may be established after the Secretary has issued an order which is *prima facie* evidence in the courts, and then to go into the courts, before juries, and even in this matter, as I understand it, they cannot go into a statutory court which has no jurisdiction to make awards for the payment of money. In other words, they are just trying to get around the reparations provisions.

There is one other thing I wish to say. These rates of ours were set on May 11, 1932. They were filed with the Secretary on that date, and he reduced the rates on June 14, 1933, and it is the difference between these two that has been impounded. We pleaded in our petition to set aside—and I am now referring to the doctrine in the Arizona grocery case—that these rates were 10 per cent lower than the rates fixed by the Secretary in 1923, and which we had been observing ever since, and they expressly admitted in their answer that that was so, and that we had fixed our rates within the maximum of the rates fixed by the Secretary in 1923. Yet in the face of the Arizona grocery case, which holds that no reparation can be awarded under such circumstances, they are attempting, to my mind, to do precisely that by this device of a *nunc pro tunc* order in the teeth of the statute.

Further Argument by Mr. Wendel Berge

MR. BERGE. Your Honor, may I say just a word?

MR. JUSTICE BUTLER. Yes.

MR. BERGE. In my other argument I admitted, and I think correctly, that this does not affect the power of the Secretary to proceed with the proceedings undertaken, but I do wish to focus attention on this difference, that while

that may be true, it does at the same time make this appeal moot; I mean, there is a difference between the power of the Secretary to proceed and enter a new order which may be challenged in the new proceeding, on the one hand, and on the other hand our appeal, which involves an order for the distribution of money.

It is true that the Secretary could go right ahead with his proceeding and there is nothing to stop him until its enforcement is enjoined by a court, irrespective of how this appeal is determined, irrespective of whether you now grant a stay, irrespective of whether finally you uphold or set aside the order of the District Court. But that is one thing. Another thing is that this is an appeal from an order of distribution which we think comes right within the Baltimore & Ohio case. Since the order itself from which we are appealing affects the impounded funds, if the funds are distributed undoubtedly our opponents would contend that the appeal was moot, and we would have a difficult time in meeting that.

We say that in the Baltimore & Ohio case it happened that after holding that this Court had jurisdiction to entertain the appeal, this Court then reversed the lower court. But it may well be that here we are wrong on the merits, and that this Court might finally affirm the lower court. But whether we are right on the merits or not, whether the District Court erred or was correct, in entering that order of distribution, that does not affect the jurisdiction on the appeal.

Suppose that in the Baltimore & Ohio case you had heard the appeal and then upheld the order of the District Court. The decision on the merits does not affect the jurisdiction to entertain the appeal, and I think that clearly we are within the holding in the Baltimore & Ohio case.

In that opinion it was stated:

"It is well understood that this court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.

"Moreover, the proceeding below out of which this denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. * * * The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first."

You there held with appellants on the merits, but certainly what was said here equally applies to the dispute which has arisen with respect to this District Court.

MR. JUSTICE BUTLER. Assume it is appealable.

MR. BERGE. That being so, the purpose of the appeal clearly fails if the money is disbursed meanwhile, because it is an appeal from an order of distribution.

MR. JUSTICE BUTLER. That has nothing to do with the Secretary's proposed action.

MR. BERGE. That is correct.

MR. JUSTICE BUTLER. So that does not involve at all the "big question" you were talking about.

MR. BERGE. It does not. I want to emphasize the difference. A failure to grant our stay would not affect the power of the Secretary to proceed, but it would affect this particular appeal. If we have not impressed your Honor with the merits of our appeal—

MR. JUSTICE BUTLER. Has your appeal any merit at all unless there is some action to be taken by the Secretary? How can it have any merit unless it is the great question which has been suggested by counsel here, by Mr. Arnold, and by the Solicitor General, and by others? Unless he can come in and make the order, what do you want with the nunc pro tunc order?

MR. BERGE. That may be or may not be the kind of order he will make.

MR. JUSTICE BUTLER. But this is no possible case for the application of the doctrine of nunc pro tunc. That is the entry of an order now which should have been made then. This Court has held that that order should not have been made then.

MR. BERGE. There could be a new order entered effective as of that date.

MR. JUSTICE BUTLER. Your position is that, having initiated the proceeding in 1930—

MR. BERGE. Originally.

MR. JUSTICE BUTLER. And having gotten around in 1933 to making an order, and then five years later it is adjudged invalid, with his only power to make an order affecting rates thereafter to be applied—your position is that he can in some fashion, in this step here, make an order now which will be read to have applied to this period, and that is the only ground you have for this appeal, is it not?

MR. BERGE. The merit of our appeal I think rests on a determination of that question.

MR. JUSTICE BUTLER. Of that question, and that question only, is it not?

MR. BERGE. I think, stated broadly, that is correct. That is the question involving the merit of the appeal, and I have stated it to you this morning because we felt that it was necessary that we advise you what the questions would be.

MR. JUSTICE BUTLER. You do not in reality disagree at all with the construction of the Court below as to the condition on which this deposit was made, do you?

MR. BERGE. I think we do.

MR. JUSTICE BUTLER. Mr. Cooke read it.

MR. BERGE. I think we disagree, your Honor.

MR. JUSTICE BUTLER. In what respect?

MR. BERGE. Shall I go over the ground?

MR. JUSTICE BUTLER. That court stated that the understanding was that these deposits were made to the end that the order were sustained the rate payers would get the

difference, that it would be returned. That is the substance of their ruling, is it not?

MR. BERGE. Except—

MR. JUSTICE BUTLER. And that is always intended in connection with such deposits in railroad cases and gas cases and so on.

MR. BERGE. Except that we contend that the money was to be held until the cause was terminated.

MR. JUSTICE BUTLER. Has not the cause been terminated? This was a suit to set aside an order which was invalid on the ground that the Secretary did not give a hearing. We held that he did not give a hearing and commanded the lower court to reverse its judgment and set aside the order. That is the situation, is it not?

MR. BERGE. We think it is more than that, your Honor.

MR. JUSTICE BUTLER. What more to it can there be than that?

MR. BERGE. We think that was one of the grounds but we think it was contemplated that there should be a determination in the proceeding whether the rates were substantially fair.

MR. JUSTICE BUTLER. Let me be sure that I understand what you are saying. You contend that in the suit brought by Morgan and the other agencies the issue of reasonableness was to be decided by the court?

MR. BERGE. No.

MR. JUSTICE BUTLER. Then I misunderstood you.

MR. BERGE. The issue was whether or not the rates were arbitrary and without evidence to support them. That is perhaps stated conversely.

MR. JUSTICE BUTLER. Whether the order was made in accordance with law was the only question, was it not? But that is a question of law, whether there was a hearing.

MR. ARNOLD. May I make a statement, your Honor?

MR. JUSTICE BUTLER. Yes. I want you to make one. You emphasized the importance of this question.

MR. ARNOLD. I think the question is whether a procedural defect in the order has the result of terminating the cause. I would make the analogy, for instance, of a judgment given by a lower court and an amendment—this is not a close analogy, and I am not citing it as an authority, but we will get the picture—an amendment of pleadings to conform to proof or an amendment of a judgment to conform to proof. It seems to me that the great procedural principle, in which, among other things, I am interested, is whether an admittedly procedural defect, which can be corrected without any injustice to the parties, should have a jurisdictional effect on the order, and I would say that whether you call it *nunc pro tunc*—and I would agree that possibly that phrase is unfortunate—or whether you call it an amendment of something which has substance and validity—

MR. JUSTICE BUTLER. What do you mean by “jurisdiction” as distinguished from “procedure”? I will be more specific. The Secretary had jurisdiction to bring on an investigation, and he did it. Did he have jurisdiction to make an order without evidence?

MR. ARNOLD. I think he had no jurisdiction to make an order without evidence.

MR. JUSTICE BUTLER. Let me ask you a question following that. There having been evidence, did he have jurisdiction to make an order without considering it?

MR. ARNOLD. I think—

MR. JUSTICE BUTLER. Jurisdiction now.

MR. ARNOLD. Without considering it?

MR. JUSTICE BUTLER. Yes.

MR. ARNOLD. I think that a court having the power—

MR. JUSTICE BUTLER. Are you not creeping up a little on your own argument when you distinguish between that which is procedural and that which is jurisdictional? We want jurisdiction to do what? Did he have jurisdiction to make the order?

MR. ARNOLD. Yes.

MR. JUSTICE BUTLER. Without reading the evidence?

MR. ARNOLD. He had jurisdiction to make any kind of a snap judgment, and that is a procedural defect.

MR. JUSTICE BUTLER. So it is the position of the department that to proceed without paying any attention to the evidence, reading it or considering it at all, is not a jurisdictional defect. He has jurisdiction to make the order, but it is merely a "slip", I think you called it.

MR. ARNOLD. "Jurisdiction" is a loose term. The order is valid on collateral attack.

MR. JUSTICE BUTLER. We have nothing to do with collateral attacks. I think your jurisdictional argument, as far as I can follow it, comes to this, that having jurisdiction to bring on the investigation, and having brought it on, and having appointed an examiner, who heard the evidence, then he had jurisdiction to decide the case without looking at the evidence or hearing argument upon it.

MR. ARNOLD. In a sense, his order would be valid against collateral attack.

MR. JUSTICE BUTLER. There is no collateral attack question here.

MR. ARNOLD. There is none here.

MR. JUSTICE BUTLER. No.

MR. ARNOLD. I would say the question in which we are interested, and which we think is most important, is that we consider this particular defect before us now—not having read the record—a procedural defect, and it is certainly procedural because it deals with the method of argument—which should be corrected, if it can be corrected without injustice.

MR. JUSTICE BUTLER. So is the failure to serve a summons a procedural defect, too.

MR. BERGE. I would just suggest, in closing, that whether we sustain what would be a satisfactory burden on the appeal on the merits or not, if we believe we have an appeal from this order as of right, under the Baltimore &

Ohio case the money should be held intact until the appeal is disposed of. In saying that we really sustain all of the burden we should have to sustain at this hearing.

MR. COOKE. If your Honor please, I have one suggestion. It seems to me this entire argument ought to be made in Congress. It is right in the face of the statute, and it is an argument as to the injustice of the statute.

MR. JUSTICE BUTLER. I consent to that, that you can make it to Congress if you want to.

It is not for me to decide these questions, and it is not for me to say whether, if I were deciding as the court below did, I would be of their opinion. I am going to refer this application to the Court. I am going to maintain the status quo until the Court acts upon the application. I am going to condition that order that the appeal be immediately perfected and the papers filed, and that all this be presented to the Court on the question of the stay of the order for distribution, that it be submitted in the form of briefs by either side filed before the 15th of September. You may agree upon the order.

(Thereupon, after informal discussion, the hearing was adjourned, at 1 o'clock and 30 minutes p.m.)

(9049)

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UNITED STATES SUPREME COURT, U. S.

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CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE
SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O. MORGAN
SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES

FREDERICK H. WOOD,
JOHN B. GAGE,

Counsel for Appellees.

THOMAS T. COOKE,
Of Counsel.

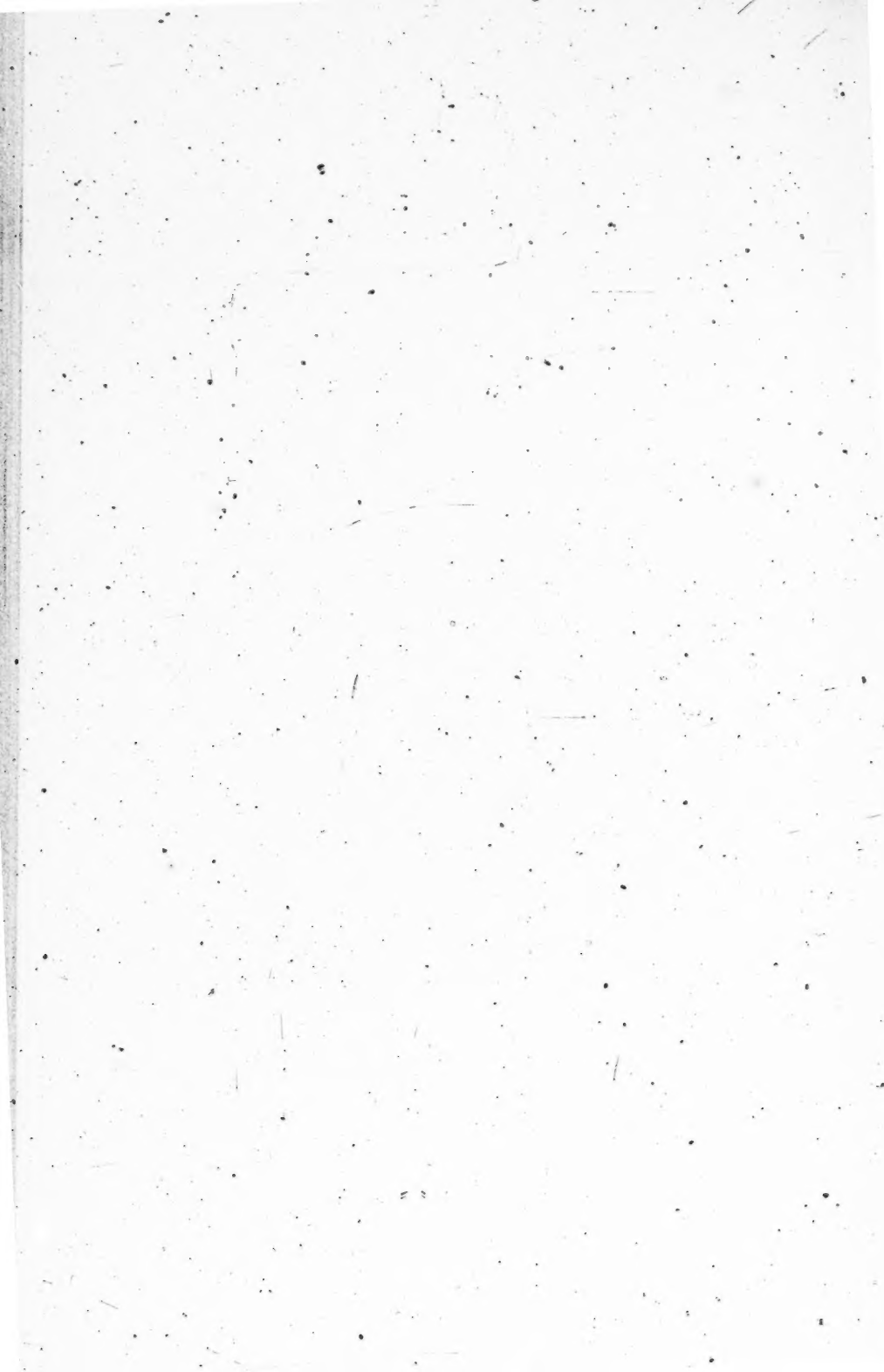


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II. Assuming the existence of power in the Secretary to make a *nunc pro tunc* order, and further assuming the existence of power in the statutory court to hold the impounded funds pending reopened proceedings before the Secretary, neither of which powers exists, the statutory court was nevertheless correct in concluding that the terms of the temporary restraining order gave it no option but to return the impounded funds to the market agencies

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III. There is no merit in the argument of appellants that when there has been a failure to comply with the fundamental procedural provisions of the statute, which are conditions precedent to the effectiveness of any rates fixed by the Secretary, the statutory court in dealing with an impounded fund must import into the case an issue of what were reasonable charges during the period of impounding. This being their fundamental premise, their appeal must fail. 20

IV. The Secretary is without power to make a *nunc pro tunc*, pre-dated or retroactive order. Since it is conceded that no other type of order which he can make can affect the impounded funds, this appeal must fail. 26

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2. The prior decisions of this Court in this case constitute a complete answer to the Government's contention that the so-called "procedural" defects by reason of which the Secretary's prior order was set aside, may now be corrected in such a way as to permit the Secretary to enter a new order as of the date of the old 27

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4. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is not a decree which is part of or incidental to the appealable final decree in the main suit; it is a mere ministerial order, direction or instruction to the Clerk incidental to the termination or the dissolution of a non-appealable temporary restraining order 69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA AND THE
SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O. MOR-
GAN SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

No. 221

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES

Opinion Below

The opinion upon the order appealed from (R. 200-202),
which was made and entered June 18, 1938, appears at
R. 248 and is reported in 24 Fed. Supp. 214.

Jurisdiction

On October 10, 1938, this Court noted probable jurisdic-
tion and postponed consideration of the motion to dismiss
or affirm to the arguments upon the merits. The Govern-
ment relies for jurisdiction upon Section 47(a), Title 28
U. S. C. (Act of October 22, 1913; c. 32, 38 Stat. 220),
which Section 316 of the Packers and Stockyards Act of
1921 (7 U. S. C., § 217) makes applicable. Section 47(a)

permits a direct appeal to this Court only from a "final judgment or decree" of the statutory court. Section 47 permits a direct appeal to this Court from an order granting or denying an interlocutory injunction. No provision is made for any appeal from the granting of a temporary restraining order. The only cases relied on by appellants in their jurisdictional statement (p. 14) to sustain the jurisdiction of this Court are *B. & O. R. R. Co. v. United States et al.*, 279 U. S. 781; *Atlantic Coast Line v. Florida*, 295 U. S. 301; and *Morgan v. United States*, 298 U. S. 468, 304 U. S. 1, rehearing denied, 304 U. S. 23.

The Government has not argued in its brief the question of jurisdiction. It is our contention that the appeal is not from a "final judgment or decree" but from a mere ministerial order appurtenant to the liquidation of a non-appealable temporary restraining order and required by the terms thereof. Since the Government has not argued the jurisdictional point, we will answer their substantive contentions in Part One of this brief and, in Part Two thereof, discuss the jurisdictional point.

Questions Presented

1. Whether a rate-fixing order made by the Secretary of Agriculture, and invalidated by this Court for a "vital defect" in the administrative hearing, may be validated *nunc pro tunc* as of the time, some five years ago, when the invalid order was made, notwithstanding that the Packers and Stockyards Act merely authorizes the Secretary in proceeding upon his own motion, as he did in this case, to make rates "thereafter to be observed" and "after full hearing."

2. Whether, when, in a suit to set aside a rate-fixing order, funds have been deposited in court by market agencies subject to the jurisdiction of the Secretary of Agriculture, as a condition of obtaining a temporary restraining order against the enforcement of his rates, which rates upon appeal this Court has held invalid, and which temporary restraining order permitted the collection by the market agencies of the rates in tariffs duly filed by them with the Secretary of Agriculture, it is mandatory for the Court to retain these impounded funds, after the cause before it has terminated, for the purpose of ultimately distributing the funds in accordance with a *nunc pro tunc* determination to be made by the Secretary as to what constituted reasonable rates during the period of the impounding, although they were impounded "pending final disposition of this cause."

3. Whether, upon this Court's reversing a decree of the statutory court which contains no provision concerning said impounded funds, and upon the statutory court's entering a decree of permanent injunction against the enforcement of the Secretary's rates fixed in the invalid order above-mentioned, and upon its ordering the return to the depositors of the funds deposited by them as security against the Secretary's order being held valid, this Court has jurisdiction to review the order of the statutory court as a "final judgment or decree," or whether the order being appurtenant to the liquidation of a non-appealable temporary restraining order and compelled by its terms, and requiring no action upon the part of any one but the clerk, it is a non-appealable ministerial order.

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Statement

This case is here for the third time. The Court has rendered three opinions therein. *Morgan v. U. S.*, 298 U. S. 468, 304 U. S. 1, rehearing denied, 304 U. S. 23, the final result being the invalidation of an order of the Secretary of Agriculture for a "vital defect", not a mere "irregularity in practice", in the hearing before him.

On June 14, 1933, the Secretary of Agriculture, purporting to find the rates in the tariffs on file with him to be unjust and unreasonable,¹ issued an order reducing maximum commission rates for selling livestock at the Kansas City Stock Yards (R. 18, 94). The commissionmen challenged this order by petitions to set aside in the District Court of the United States (specially constituted) for the Western District of Missouri (R. 1-128). That Court granted a temporary restraining order which, as extended, has continued in effect throughout this litigation without any temporary injunction (R. 129, 130, 171, 181). It was provided in this order that the petitioners might continue to collect their filed rates upon giving security to the consignors of livestock (the rate-payers) by impounding collections in excess of the Secretary's rates, "pending final disposition of this cause" (R. 130). After a hearing, the statutory Court refused permanent injunctions (R. 137, 171).

Upon appeal to this Court, the statutory Court's decree was reversed for failure to permit petitioners to try the issue of whether or not the Secretary had accorded them

¹In the Secretary's answer to the petition to set aside his order, he admitted that these rates, which displaced rates approved by his predecessor in 1923, were 10% lower than these rates of the Secretary (R. 230). The doctrine of *Arizona Grocery Company v. Atchison, etc. R. R.*, 284 U. S. 370, therefore, bars all reparation claims based on the lowered rate, as any in this case must be.

the "full hearing" required by Section 310 of the Packers and Stockyards Act of 1921. *Morgan v. U. S.*, 298 U. S. 468. After a new hearing in the Court below, it again refused permanent injunctions and decreed that the petitions be dismissed (R. 180). Upon appeal, this Court, on April 25, 1938, again reversed the decree of the District Court and invalidated the Secretary's order for what it termed a "vital defect" in the hearing, "more than an irregularity in practice," (p. 22) and issued its mandate for further proceedings in conformity with its opinion and decree, as according to right and justice and the laws of the United States ought to be had (R. 182-183); *Morgan v. U. S.*, 304 U. S. 1, rehearing denied, 304 U. S. 23. Upon denying the petition for rehearing, it refused to give any directions to the court below concerning the disposition of the impounded funds.²

Pursuant to this mandate, the District Court entered its final decree permanently enjoining the Secretary's order (R. 203-204). At this time it held approximately \$586,000 in funds impounded pursuant to its temporary restraining order, being the difference between the collections made by the commissionmen under their tariffs filed with the Secretary of Agriculture on May 11, 1932 (which tariffs the invalid order of the Secretary of Agriculture was unsuccessful in displacing) and the amounts which would have been collected under the Secretary's rates. The impound-

²It is needless for us to claim, as the Government in its brief asserts we do, that the release of the impounded funds followed automatically upon this Court's decision. The decree below (R. 180), which this Court reversed, contained no provision concerning the impounded funds. This, we presume, prevented this Court from considering the matter. We of course rely upon the effect of the decree below in granting a permanent injunction which made the continuance of a temporary restraining order unnecessary, and the action of the Court below in ordering the funds returned.

ing ceased November 1, 1937, when the Secretary and the commissionmen agreed on new rates for the future pursuant to a stipulation setting forth changed conditions (R. 191).

On the day after the mandate of this Court was filed, the District Court was moved by the appellants to stay the return of the impounded moneys to appellees on the ground that this Court's invalidation of the Secretary's order was not conclusive, it being represented and argued to the Court that the Secretary could reopen the proceedings and "validate" his invalid order *nunc pro tunc* as of June 14, 1933 (R. 185). It was further argued that in the event this should be done, the moneys deposited by the commissionmen as security for refunds in the event the Secretary's order had been held to be valid, would have to be returned to the consignors of livestock. The Court below rejected this argument and ordered the funds returned to the commissionmen, expressing the opinion that there was not the "faintest shadow of merit" in the contentions of the Secretary (R. 249) and no "shred of reason or law" in his proposal to make a *nunc pro tunc* order (R. 250). It further said that the funds were deposited upon the "clear understanding" that in the event the Secretary's order should be declared invalid, they would be returned to the commissionmen, and that it would be an act of "bad faith" on the part of the Court to refuse to return them (R. 249).

The Secretary brings this appeal from the order of the Court below directing the return of the impounded funds (R. 204, 208), alleging that it was mandatory for the Court to retain them, even after the termination of the cause before it, for a "reasonable time" to permit the Secretary to conduct proceedings designed to "validate" his invalid order. He does not appeal from the order denying him a stay of distribution.

Statutes Involved

The statute which governs the powers of the Secretary of Agriculture to regulate the rates and charges of the commissionmen at the Kansas City Stock Yards is Title III of the Packers and Stockyards Act of 1921, as amended (7 U. S. C., c. 9, §§181-229; c. 24, 42 Stat. 159 *et seq.*). The full text of this Title containing Sections 301 through 316, inclusive, is printed as an appendix to this brief. By reason of its length, it is not here set forth in full. The section of this Title which is most relevant upon this appeal is Section 310, which reads as follows:

"SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that

it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

The statutory provisions which affect the jurisdiction of this Court are contained in the Packers and Stockyards Act and in the Interstate Commerce Act.

Section 316 (7 U. S. C., Sec. 217) of the Packers and Stockyards Act (7 U. S. C., c. 9, Sections 181-229; c. 64, 42 Stat. 159 et seq.) provides:

"For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168)."

The applicable provisions of the laws relating to suits brought to set aside, suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals in such suits are found in Title 28, U. S. C., Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220).

Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48.

Section 47, after providing for the procedure in connection with the issuance of an interlocutory injunction; provides:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused;
* * * "

Section 47a provides in part as follows:

"A *final judgment or decree* of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (Italics ours.)

Section 238 of the Judicial Code, as amended (28 U. S. C. Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938), in so far as relevant, provides as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

"(1) * * *

"(2) * * *

"(3) * * *

"(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) * * *"

Summary of Argument

I.

Assuming, contrary to the plain terms of the statute, that the Secretary of Agriculture in a proceeding instituted on his own motion has the power to fix rates in the past by making at some time in the future a *nunc pro tunc* order dated as of June 14, 1933, this nevertheless would not confer power upon the statutory court to hold the impounded funds after the cause before it has terminated.

II.

Assuming the existence of power in the Secretary to make a *nunc pro tunc* order, and further assuming the existence of power in the statutory court to hold the impounded funds pending reopened proceedings before the Secretary, neither of which powers exists, the statutory court was nevertheless correct in concluding that the terms

of the temporary restraining order gave it no option but to return the impounded funds to the market agencies.

III.

There is no merit in the argument of appellants that when there has been a failure to comply with the fundamental procedural provisions of the statute, which are conditions precedent to the effectiveness of any rates fixed by the Secretary, the statutory court in dealing with an impounded fund must import into the case an issue of what were reasonable charges during the period of impounding. This being their fundamental premise, their appeal must fail.

IV.

The Secretary is without power to make a *nunc pro tunc*, pre-dated or retroactive order. Since it is conceded that no other type of order which he can make can affect the impounded funds, this appeal must fail.

1. Except in reparation cases, the statute forbids the Secretary to make orders governing completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

2. The prior decisions of this Court in this case constitute a complete answer to the Government's contention that the so-called "procedural" defects by reason of which the Secretary's prior order was set aside, may now be corrected in such a way as to

permit the Secretary to enter a new order as of the date of the old.

3. Unless an order made now ought to have been made then, it cannot be issued *nunc pro tunc* even in a court proceeding.

4. Neither the *Atlantic Coast Line* case nor the other authorities cited by the appellants are in point.

V.

Whether or not the rate-payers are now barred from obtaining reparations has nothing to do with the merits of this appeal and is a question extrinsic to the record.

VI.

The affirmance of the lower court's decision will result in no injustice and will in no way hamper the proper carrying on of administrative proceedings. Moreover, the consequences of any other decision in this case would be absurd.

VII.

This appeal, not being from "a final judgment or decree," but from a mere ministerial order which, upon the termination of the cause, was required by the unambiguous terms of a non-appealable temporary restraining order, this Court lacks jurisdiction.

1. The statute limits appeal to a "final judgment or decree." Since the order appealed from is not a

"final judgment or decree," but is a mere ministerial order or direction to the Clerk authorizing the return of impounded funds such as was required by the unambiguous terms of a non-appealable temporary restraining order, which order or direction merely restores the *status quo ante* the temporary restraining order, this Court lacks jurisdiction.

2. The order appealed from, unlike the decree in the *Baltimore and Ohio* case, is not a decree resulting from an equity proceeding in which one party has asked restitution from the other, but is a mere ministerial order or direction to the Clerk, upon the occasion ceasing for the maintenance of security, to return moneys belonging to a litigant.

3. The order, appealed from, unlike the decree in the *Baltimore & Ohio* case, is strictly consistent with the mandate of this Court. In reality, however, it was not required by the judgment or mandate of this Court, which reversed a decree containing no provision relating to the impounded funds, but is an order to which appellees became immediately entitled when the judgment of this Court absolved them from the necessity of maintaining a temporary restraining order in force.

4. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is not a decree which is part of or incidental to the appealable final decree in the main suit; it is a mere ministerial order, direction or instruction to the Clerk incidental to the termination or the dissolution of a non-appealable temporary restraining order.

ARGUMENT

PART ONE

THE ORDER OF THE STATUTORY COURT SHOULD BE AFFIRMED.

I.

Assuming, contrary to the plain terms of the statute, that the Secretary of Agriculture in a proceeding instituted on his own motion has the power to fix rates in the past by making at some time in the future a *nunc pro tunc* order dated as of June 14, 1933, this nevertheless would not confer power upon the statutory court to hold the impounded funds after the cause before it has terminated.

It is inconceivable that any type of administrative order, other than a *nunc pro tunc*, pre-dated or retroactive order, effective as of June 14, 1933, could possibly affect, or be enforced in court to affect, the funds impounded between June 14, 1933 and November 1, 1937. The appellants do not claim otherwise. It is elementary that a *nunc pro tunc* order must be one which could properly have been made at the time to which it is related back (Black on Judgments, 2d ed., 1902, § 133). This Court has said in no uncertain terms, as we show in Point IV, pp. 29-33, *post*, that no order ought to have been made on June 14, 1933. The power is to be exercised to correct clerical, not judicial, errors. *Id.*, § 132.

Concerning the proposal made by the Secretary to make at some time in the future such a retroactive, pre-dated or *nunc pro tunc* order, as of June 14, 1933, the statutory court, referring to Section 310 of the Packers and Stockyards Act of 1921, made the following very pertinent statement (R. 250):

"We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges lawfully in effect then and thereafter has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed '*after full hearing*' (and there has been no such hearing), and that when they have been so determined and prescribed they shall '*be thereafter observed.*' " (Italics ours.)

There are not a few other reasons, which we will later discuss, which effectively preclude the possibility of the Secretary's making any such *nunc pro tunc*, pre-dated or retroactive order. Let us assume, however, for the purpose of argument, that he has full power to do so. Nevertheless, it is entirely clear that the statutory court was right in concluding that it had no power to grant his request to retain in its possession the impounded funds pending any further proceedings before him, and that it was not even within its discretion to do so. The Secretary, however, cannot be content with insisting that the Court has discretionary power in the premises, because it has, by issuing the order appealed from, exercised any discretion it has in

favor of appellees, and has ordered the impounded funds returned to the market agencies and has refused to exercise its discretion in favor of the Secretary. No attempt has been made by him to show any abuse of discretion. He must insist, as he does, that it was *mandatory* for the court to hold these funds pending his proceeding to make a *nunc pro tunc*, pre-dated or retroactive order, as of June 14, 1933. He can, of course, cite no authority for any such proposition.

The only "cause" of which the statutory court ever obtained jurisdiction was the proceeding to set aside the Secretary's order. When, pursuant to the judgment and mandate of this Court, the statutory court entered its final decree granting a permanent injunction against the enforcement of this order, that "cause" terminated. This was the "cause," and the only "cause," in which the impounded funds could have been, or were, deposited (R. 129, 130). The litigation before the court having been completed, it is plain that it lacked power to do what the Secretary requested it to do; that is, to retain the impounded funds pending reopened proceedings before him. The statute (Title 28 U. S. C., § 44) permits the court only "to enjoin, set aside, annul, or suspend in whole or in part" an order of the Secretary of Agriculture. When one or more of these things have been done, the "cause" is terminated, except that the *status quo ante* may, of course, be restored. In fixing rates for the commissionmen at the stockyards, the Secretary acts as an arm of Congress. It would be quite as sensible to argue that a court has power to retain the impounded funds in order to afford Congress a reasonable opportunity to pass a retroactive statute.

The court had power to impose, as a condition of granting temporary relief in the form of a temporary restrain-

ing order, the provision for the impounding of part of appellees' collections. But when that temporary restraining order was no longer required as a result of the cause being terminated by a final decree granting a permanent injunction, it completely lacked power to retain the funds and was obligated to do as it did; that is, order the immediate return of the impounded funds to those who had put them up as security against an event which had failed to happen.

II.

Assuming the existence of power in the Secretary to make a *nunc pro tunc* order, and further assuming the existence of power in the statutory court to hold the impounded funds pending reopened proceedings before the Secretary, neither of which powers exists, the statutory court was nevertheless correct in concluding that the terms of the temporary restraining order gave it no option but to return the impounded funds to the market agencies.

In the preceding point, we have given some conclusive reasons why the Secretary can make no *nunc pro tunc*, predated or retroactive order and will later give a number of other reasons. We have also shown that, even if it could be held that the Secretary did have power to make such an order, the statutory court, as it correctly held, had no power, after the cause before it had terminated, to hold impounded funds while the Secretary should conduct his reopened proceedings. We now assume not only that the Secretary has the power to make such a *nunc pro tunc* order, but also that the court, generally speaking, if there be no particular im-

pediment to the exercise of the power, can hold the impounded funds while the Secretary conducts his reopened proceedings for the purpose of making his *nunc pro tunc*, pre-dated or retroactive order. Even, however, were both of these invalid assumptions valid, the statutory court could not in this case have retained the impounded funds.

The temporary restraining order leaves no doubt concerning the purpose for which these funds were impounded, to wit, security against the Secretary's order being held valid in the cause to set the order aside. That order (R. 129) restrains the Secretary from putting the rates fixed in his invalid order of June 14, 1933, into effect. It expressly permits the tariff rates regularly filed by appellees with the Secretary on May 11, 1932, to continue in effect.¹ The reason for these provisions is very clearly stated; that is, to prevent the irreparable damage to the market agencies which would ensue "in the event the relief in said petition prayed was finally granted by this Court" (that is, the setting aside of the Secretary's order), which irreparable damage would consist of the loss of the amounts by which their tariff rates exceeded the Secretary's rates (R. 129). The Secretary and all other persons seeking to take any action "in any wise militating against" the rights of petitioners to collect their tariff rates (R. 130), are enjoined

¹Obviously, the scheme of the statute is such that either the Secretary's rates or the tariff rates filed with him by the market agencies had to be the effective rates during the period of impounding. The Government's entire argument, however, is based upon the contention that some other rates may have been the proper and reasonable rates during this period. It expressly contends that the Secretary in his new order may fix rates differing both from his invalid rates and from the tariff rates of the market agencies and that, if he does so, the impounded funds must be distributed in accordance with these rates. Of course, there never was any such issue in the case before the statutory court.

from doing so by enforcing the Secretary's rates. The deposits are to be made "pending final disposition of this cause" (R. 130). It is crystal clear that such deposits were made, as they always are in such cases, in lieu of a bond and as security against an event which never happened, to wit, the upholding of the Secretary's order in the courts. The provision that the names and addresses of the rate-payers "upon whose behalf" the amounts were collected, must be filed with the court, is nothing more than a requirement that those who are secured by the deposits be named.

All this the statutory court clearly recognized when, in referring to the impounded funds, it said (R. 249-250):

"The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

"If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined."

The statutory court was clearly right. Such being the terms of the temporary restraining order pursuant to which the funds were impounded, there can be no doubt that,

whatever the power of the court, generally speaking, to retain impounded funds after the litigation before it has terminated, pending administrative proceedings, and whatever the power of the Secretary to make a *nunc pro tunc*, pre-dated or retroactive order in such proceedings, the return of the impounded funds was mandatory. The Government's argument that it was mandatory for the Court to retain the funds is wholly baseless.

III.

There is no merit in the argument of appellants that when there has been a failure to comply with the fundamental procedural provisions of the statute, which are conditions precedent to the effectiveness of any rates fixed by the Secretary, the statutory court in dealing with an impounded fund must import into the case an issue of what were reasonable charges during the period of impounding. This being their fundamental premise, their appeal must fail.

The answer to this argument is two-fold: First, that the failure of the Secretary to accord to the market agencies their statutory right to a "full hearing" was jurisdictional, for it is certainly true that the granting of a "full hearing" is a condition precedent to the making of a valid order. Moreover, this Court has said that the Secretary was guilty not of a mere "irregularity in practice" but that the hearing had contained a "vital defect" (304 U. S. 1, 22). As appears from the several opinions of this Court, there were in fact three separate and distinct reasons contributing to this

"vital defect." In the first place, the Secretary's procedure was such that neither by complaint, brief or proposed findings, or in any other way, were the Government's claims and contentions disclosed to the market agencies, the right to argue in such circumstances being futile. Second, the findings were not made by the Secretary upon his own consideration of the evidence, but by subordinates, including "the active prosecutors for the Government" (p. 24). Third, the Secretary held *ex parte* discussions with those representatives of the Government who had tried the case and who made the findings which he adopted *in toto*. The first two of these considerations go to a "full hearing." The last one goes to a "fair hearing." Certainly the denial of a "full hearing" is jurisdictional. The denial of a "fair hearing" under such circumstances would seem to suggest the necessity of suppressing the findings thus made, even if a wholly new trial could not be demanded. It is unnecessary to speculate further along these lines. The defects were clearly jurisdictional. But whether or not they were jurisdictional, there was a complete failure to comply with the essential and fundamental requirements of the statute which made the order wholly invalid.

Entirely aside, however, from the consideration of whether or not the Secretary's mistakes were merely procedural errors or were jurisdictional, it is perfectly clear that the argument made by appellants that so-called substantive rights survive such fundamental procedural delinquencies is wholly untenable. This argument is that, since Section 305 of the Act provides for just and reasonable rates and prohibits unjust and unreasonable rates, the ratepayers must thereby gain substantive rights which cannot be defeated by any merely procedural requirements of the statute. It is said that the impounded funds cannot be dis-

tributed until the Secretary has made an order which has either been upheld or set aside by the courts "on the merits."

Since the courts review the findings of administrative tribunals only to determine if they are supported by substantial evidence, there is in fact no review "on the merits," although that expression may be used colloquially to distinguish this ever-present question from other less frequently raised questions having to do with the regularity of the administrative proceedings. Nor, if it be true that the court must hold the impounded funds until the Secretary's order is either set aside or upheld by reason of its findings being unsupported or supported by substantial evidence, can any reason be discerned why the impounded funds should not be held until the administrative tribunal, which is both prosecutor and judge, confesses that it is unable to obtain substantial evidence to support its necessary and pertinent findings.

But it is plainly and necessarily untrue that failure to follow the procedural provisions of the Act cannot prejudice so-called substantive rights. There are no such things as just and reasonable rates or unjust and unreasonable rates in the abstract. The Government itself has uniformly argued in this case that there is nothing to prevent the Secretary from making any rates he chooses for the personal services of commissionmen, provided he considers all the relevant factors. Certainly the Act itself provides no criteria or standards of reasonableness. If the market agencies duly and regularly file their tariffs of rates with the Secretary, and they become effective by reason of Section 306 of the Act, they are authorized by the statute to collect them, no matter how unjust or unreasonable they may be, barring legal and valid action by the Secretary. He can, by Section 306(e), suspend a filed tariff for sixty

days, but for sixty days only. At the expiration of sixty days the market agencies are legally entitled to collect the rates prescribed by their filed tariffs. These collections are, however, subject to reparation claims, *but only if complaints for reparation are filed with the Secretary within ninety days after the cause of action arose*. The Secretary is expressly prohibited from awarding reparation on his own motion (Section 309(c)). Thus, no matter how unreasonable or unjust the rates collected have been, there is absolutely no remedy remaining in the rate-payers unless they have complied with the purely procedural provisions of the statute. Of course, the Secretary may on his own motion at any time, "after full hearing," hold that the rates in filed tariffs are unreasonable and displace these rates by lower schedules. He can, however, only make rates "thereafter to be observed" (Sec. 310(a)).

Lastly, upon the doctrine of the *Arizona Grocery* case (284 U. S. 370), if the market agencies, as they did in our case, file schedules of rates lower than rates fixed by the Secretary at some time in the past, it does not matter how unjust and unreasonable these rates may be in the light of changed conditions, they nevertheless can never be the subject of reparation proceedings. Here, again, we see that the mere failure of the Secretary to take note of changed conditions effectively deprives the rate-payers of all protection.

Again, looking at the statute from the standpoint of the market agencies, who, after all, must also have some so-called substantive rights, it is noted that Section 305 says that they may charge just and reasonable rates. Yet, if they do not, in accordance with the procedure set up by the statute, file schedules of rates with the Secretary, they are absolutely unprotected in their so-called substantive

rights, no matter how just and reasonable the rates they may have charged have been in fact. In other words, failure to comply with the procedural provisions of the statute raises conclusive presumptions in all of the above cases, and whether or not the rates were in fact unjust and unreasonable has nothing to do with the matter.

The argument in the Government's brief that this Court has power to mold the statute to effect substantive justice is significant. It really means that the claim is being made that this Court has power to ignore the express provisions of the statute. It also means that the Court is being asked to import into this case an issue which has never been in it, to wit, the issue of what would have been reasonable charges for the appellees to make during the period June 14, 1933 to November 1, 1937. It is insisted that general equitable principles require that the impounded funds be distributed only in accordance with such reasonable rates. But neither the court nor the Secretary, acting on his own motion merely, can fix reasonable rates for a past period. The only issue before the statutory court at the times it passed on the case before it, and the only issue which has ever been before it, has been that of the regularity of the proceedings before the Secretary of Agriculture. Either the rates prescribed in the tariffs filed by the market agencies were in force during the impounding period, or the Secretary's rates were. When the Secretary's order was invalidated by this Court, the only remaining alternative was that the tariff rates were in force. No talk about equitable jurisdiction to avoid multiplicity of suits by reason of probably non-existent reparation claims can conceal the fact that the rate-payers have no legal or equitable rights in this fund, even conceding that the quasi-

judicial tribunal known as the Secretary of Agriculture has any status to volunteer to enforce their rights.

The above considerations also dispose of the attempted analogy between appellate review of lower court decisions and judicial review of the decisions of administrative tribunals. These two types of review are obviously quite different in character. Entirely aside from this, moreover, the Packers and Stockyards Act, like the Interstate Commerce Act, has been molded on the theory that the constitutional powers of an administrative tribunal differ radically from those of a court. It is for this reason that in the Packers and Stockyards Act the Secretary of Agriculture is denied the power to make reparation orders which relate to the past, except upon complaint from the interested party; and it is provided that these reparation orders, when made, shall be only *prima facie* evidence of the fact (Section 308 (f)). In other words, the Secretary, acting on his own motion, can only make prospective rates. On the other hand, courts are fully authorized to deal with the past. In the case of a court, therefore, when it is allowed to correct a procedural error, there is usually no necessity of its designating as of what date the decision is made. Whenever made, it controls the past facts. But in this case, that is the whole point, The Secretary can accomplish nothing with respect to the impounded funds by anything other than a *nunc pro tunc*, pre-dated or retro-active order. Such an order he cannot make upon his own motion because it is equivalent to awarding reparation for the past. We do not need to claim that the Secretary cannot begin with the old record or even that he cannot employ the old findings as tentative findings. All we need claim is that the order, when made, cannot be dated back. This claim is plainly valid.

IV.

The Secretary is without power to make a *nunc pro tunc*, pre-dated or retroactive order. Since it is conceded that no other type of order which he can make can affect the impounded funds, this appeal must fail.

1. Except in reparation cases, the statute forbids the Secretary to make orders governing completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

The scheme of Title III of the Packers and Stockyards Act of 1921 for determining what are just and reasonable rates and charges and preventing the collection of unjust and unreasonable rates and charges, is very much like that of the Interstate Commerce Act. The market agencies are required to file tariffs of rates and charges which they consider just and reasonable (Section 306). The rates and charges in these filed tariffs, in the absence of action by the Secretary of Agriculture, are presumed to be reasonable. They must be collected under pain of civil and criminal penalties (Section 306(f), (g) and (h)). Reparation for damages suffered by reason of being compelled to pay unjust and unreasonable rates can only be obtained by filing a complaint with the Secretary within ninety days after the cause of action has accrued, the order of the Secretary upon such complaint being *prima facie* evidence of the facts therein stated in the suit which must be brought in a district court of the United States to collect these damages (Sections 308 and 309). The Secretary is also authorized at any time to institute "an inquiry on his own motion, in

any case and as to any matter or thing concerning which a complaint is authorized to be made." In such an inquiry he can make any order "except orders for the payment of money" (Section 309(c)). Thus, in proceeding on his own motion, as the Secretary did in this case, he is expressly prohibited from making a reparation order. He may, however, "after full hearing," if he is of the opinion that any rate or charge of a market agency for stockyard services "is or will be unjust, unreasonable or discriminatory," "determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case" (Section 310(a)). He also has the power to issue a cease-and-desist order against such unreasonable rates and the publishing and demanding or collection thereof (Section 310(b)).

2. The prior decisions of this Court in this case constitute a complete answer to the Government's contention that the so-called "procedural" defects by reason of which the Secretary's prior order was set aside, may now be corrected in such a way as to permit the Secretary to enter a new order as of the date of the old.

The Government argues that, in analogy to the asserted power of a court in similar circumstances, the Secretary can make an order *nunc pro tunc* as of June 14, 1933, by giving or pretending to give at this time the "full hearing" to the market agencies which this Court has held he denied them at that time. The impounded funds must, it is claimed, be held by the court upon the speculative possibility that after listening to the arguments of the market agencies upon their exceptions to the tentative findings (the same as the old invalid findings), and after hearing evidence as

to the conditions during the years 1933-1937, when the funds were impounded, the Secretary may arrive at the same result as he did before, to wit, the same findings and the same rates.

It is conceded, however, that he may not arrive at the same result and may be sufficiently persuaded by the argument which he has not heretofore heard, and by the new evidence, to make other findings and other rates. Presumably, the Government will hardly contend that in such case the order can be dated back to June 14, 1933. It would seem that it would have to be admitted that different findings and different rates would require purely prospective treatment.² If the Government's consistently maintained theory that the Secretary does not have to set rates which will permit even an indisputably efficient market agency to make money, be correct; the Secretary need only watch his procedural step, take all relevant factors into consideration, and any rates he makes will be immune from attack. It is therefore obvious that if he be of a mind to, as his public statements clearly indicate that he is (Appellants' Bf., p. 96), he can very easily arrive at the same findings and rates contained in the old order. The question, therefore, as to whether he can date his order back is highly important.

The proceedings in which the order heretofore set aside was entered were instituted by the Secretary on his own motion. In such a proceeding the Secretary may not award reparation or make any order affecting the validity

²This of itself is sufficient to deflate the Government's argument which is to the effect that Section 305 of the Act permits no rates other than those determined by the Secretary to be reasonable to be charged at any time in the past, no matter what procedural errors may have been made, these, it is claimed, all being correctible *pro tunc*.

of charges theretofore collected. His power is limited to the fixing of reasonable rates for the future (*Packers & Stockyards Act*, § 310).

The Secretary's order of June 14, 1933 was set aside by this Court by reason of the Secretary's failure to accord to the respondents that "full, fair and open" hearing required by the statute as prerequisite to the entry of a valid order establishing rates for the future. The Government throughout its brief treats the defect by reason of which the order was set aside as a "procedural" defect. It then says, what we need not dispute, that administrative officers and tribunals like courts may correct their own "procedural" errors. Throughout its brief the Government treats the failure of the Secretary, under the facts of this case, to serve upon the respondents as a tentative report, the findings and order prepared by his subordinates including the "active prosecutors for the Government" and adopted and accepted by him, or to otherwise adequately advise them of the Department's claims and contentions, as something going merely to the form of the Secretary's procedure. But that which the Government regards as merely "procedural" and formal this Court regarded as fundamental and as constituting a denial to the respondents of the substance of a full and fair hearing. The Court states that plaintiffs' contention was "that the Secretary's order was made without the hearing required by the statute." This question, the Court says

"goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1, at p. 14).

A "fair and open hearing" is said to be an inexorable safeguard of the rights of those dealt with by such agencies. Congress, it is said,

"explicitly recognized and emphasized this requirement by making his [the Secretary's] action depend upon a 'full hearing'" (p. 15).

The Court points out that

"Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (p. 19).

It then points out that in this case the Secretary accepted and made his own the findings which had been prepared

"by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (p. 22).

That, the Court said:

"is more than an irregularity in practice; it is a vital defect" (p. 22).

No opportunity, the Court says,

"was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order" (p. 17).

In its opinion on the second appeal and on petition for rehearing the Court points out that while service of a tentative

report is not in every case essential to the validity of administrative orders, that which

"would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (pp. 25-26).

In its opinion on petition for rehearing the Court points out

"that findings of fact necessary to sustain the order had not been made by him [the Secretary] upon his own consideration of the evidence but as stated below" (p. 24).

These findings, said the Court,

"prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied" (p. 24).

It was by reason of such conduct upon the part of the Secretary that the Court held that the Secretary had not accorded to the respondent "the rudimentary requirements of fair play" (p. 15), and because of his failure so to do set the order aside.

Failure so to do, as the Court said, constitutes

"more than an irregularity in practice; it is a vital defect" (p. 26).

The error committed by the Secretary was therefore not a mere "procedural" error of a formal character, subject to being corrected by a subsequent order dated back to the date of the first. It was fundamental and of substance because the respondents had been denied by the Secretary that full hearing which is a prerequisite to the validity of any rate-fixing order which the Secretary may make, the only order which he was empowered to make in the proceedings before him.

Unless under the facts of this case the service of a tentative report containing the findings and proposed order as prepared by the "active prosecutors for the Government" was a mere matter of form, to be followed as a matter of course by their adoption by the Secretary, it is plain that no order may now be entered as of the date of the order set aside without again denying to the respondents that full, fair and open hearing required by the statute and by the due process clause of the Constitution. That it was not a matter of mere form admits of no doubt. The purpose of such service, as pointed out by the Court in its several opinions in this case, would be to apprise the respondents of the findings made so as to give them opportunity to take exceptions thereto and to be heard upon such exceptions by the Secretary. Upon the taking of such exceptions it would be the duty of the Secretary to consider them, not perfunctorily but in the exercise of the administrative discretion conferred upon him. Such consideration may not be had as of June 14, 1933, but only as of the time when it is given. As the Court points out:

"The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps" (p. 20).

The concluding part of the procedure, namely, the Secretary's consideration of the respondents' exceptions to the findings and order prepared by the Secretary's subordinates, has not yet taken place and cannot take place until at some future date. Without it the hearing required by the statute as written and as interpreted by this Court has not been completed. No valid order may be made until its completion, and upon its completion such order manifestly may speak only as of the future and not as of a date prior to the completion of the hearing requisite to the validity of any order which the Secretary may make. Appropriate findings sufficient to sustain the order are again essential to its validity. As the Court points out in its opinion on second appeal and on rehearing, the findings made by the active prosecutors for the Government, and which the Secretary adopted, without notice to the respondents or opportunity to be heard, were "180 in number" and "elaborate". As the Court points out in its opinion on petition for rehearing, these "findings of fact necessary to sustain the order had not been made by him upon his own consideration" but had been prepared "by those who had prosecuted the case for the Government" and "were adopted by the Secretary". Such action, the Court said, failed "to satisfy the requirement of a full hearing". Unless and until the Secretary, after consideration of the record, and after hearing the respondents upon their exceptions to the findings prepared by such active prosecutors, which have now been served upon the respondents as a tentative report, has him-

self made such findings as he then thinks it proper to make, there has been no hearing and there can be no order. That this may not be done as of June 14, 1933, is apparent upon its face.

The prior opinions of the Court in this case, therefore, are a complete answer to the Government's contention that the Secretary's failure to accord to the respondents that full, fair and open hearing required by the statute as a condition precedent to the making of any effective order on June 14, 1933, may be cured by serving in 1938 as a tentative report the findings and order prepared by the Secretary's subordinates, which should have been served in 1933, by giving consideration in 1938 to the exceptions and objections of the respondents thereto, which should have been taken and maturely considered in 1933, and after so doing make an order not as of the date upon which such steps were taken, but as of a date five years prior thereto.

Appellants answer the above by saying:

"the ultimate question is whether the Secretary's order correctly defines the substantive duty laid upon appellees by Section 305. If it does, the failure to accord them what this Court has defined as an essential part of a full hearing resulted in no substantive prejudice" (Brief, p. 65).

And, further:

"His amended findings and order will serve to show whether, or to what extent, appellees were prejudiced by the invalidity of the initial proceeding" (p. 65).

And, further:

"The further consideration of the Secretary, under a correct procedure, will show the precise amount of

prejudice resulting from the earlier procedural error" (p. 67).

And, further:

"Thus, a form of a full hearing in intended compliance with Section 310 has already been had. True, it was an erroneous form. The further proceeding will demonstrate whether or to what extent this error influenced the final result" (p. 67).

That such an amazing argument is made, rather well illustrates the desperate nature of the appellants' case. When the full hearing required by the statute has been denied, as this Court very plainly said, prejudice as a matter of law has resulted. The statute lays down no criteria or standards whatsoever to govern the determination of what are just and reasonable rates, and the Government has consistently advanced an argument in this very case, the acceptance of which would mean that the Secretary has *carte blanche* to make any rates he pleases so long as he considers all relevant factors. This was what Judge Van Valkenburgh below termed "almost dictatorial power" (R. 239). To talk in the face of these considerations about "the correct determination" and to allege that the Secretary's findings after full hearing will determine the precise amount of prejudice which has resulted to appellees from the denial of a full hearing is nothing short of sheer nonsense.

3. Unless an order made now ought to have been made then, it cannot be issued *nunc pro tunc* even in a court proceeding.

The appellants' entire argument necessarily rests upon the assumption that the Secretary may now "validate" his

invalid order of June 14, 1933, by the entry of *a nunc pro tunc*, pre-dated or retroactive order as of the same date. This argument is made despite the fact that the statute gives the Secretary, acting on his own motion, as he does here, power only to make an order "after full hearing" setting rates "thereafter to be observed" (Sec. 310).

As is well known, courts sometimes make what are known as *nunc pro tunc* orders. An examination of the authorities will show, however, that the circumstances under which these can be made are exceedingly circumscribed. It is only when the order could properly have been made at the time to which it is related back that a court is permitted to enter a *nunc pro tunc* order. 1 Black on Judgments (2d ed., 1902), Section 133. The sole legitimate purpose is to correct the record so as to make it speak the truth as to the order which was actually made (*Cf. Gagnon v. United States*, 193 U. S. 451). The power is to be exercised to correct clerical, not judicial, errors. Black, op. cit., *supra*, at Section 132.

On June 14, 1933, without according appellees a "full hearing" such as the statute requires, the Secretary issued the order which this Court has held invalid because of a "vital defect", not a mere "irregularity in practice" (304 U. S. 1, at p. 22). At that time he had not disclosed the issues or his claims and contentions to the market agencies and given them an adequate opportunity to argue the question before him. The findings contained in his invalid order had not been made by him after the consideration of the evidence which the statute requires, but by the "active prosecutors for the Government." It is his theory that he may now reopen the proceedings, accord to the market agencies the adequate opportunity to argue which he denied

them before June 14, 1933, consider the evidence and make a new order. Assuming the correctness of this theory, it is obvious that the status of the proceedings, now reopened, was on June 14, 1933, wholly incomplete. No order could have been made, much less ought to have been made, on that date. This Court has held that the order which was attempted to have been made on that date ought not to have been made. Thus, there is absolutely no room for the application of any *nunc pro tunc* doctrine to this situation. The only power which the Secretary then possessed, or now possesses, in a proceeding such as this instituted on his own motion is to fix rates for the future. Power to award reparation in such a proceeding is expressly withheld by the statute (Sec. 309(e)).

The fact is that the date June 14, 1933, has no legal significance. Upon the Secretary's own theory of his right to reopen the proceeding, he was then merely in the middle of a hearing. He could, with as much reason, date his new order in the fall of 1930, when the hearing was started, or as of the date when the taking of the evidence was completed, or as of any other prior date.

There are several other cogent reasons why a *nunc pro tunc* order will not hold water. First, it would be precisely equivalent to an order for the payment of money, since all it could possibly do would be to effect the release of the impounded funds to the rate-payers. The statute expressly provides that an order for the payment of money cannot be made on the Secretary's own motion (Sec. 309(c)). The proposed order admittedly could have no effect for the future, since the Secretary disclaims any intention of fixing rates for the future, he having on November 1, 1937, by agreement with the market agencies, fixed new and higher

rates for the future upon the basis of changed conditions (R. 191 *et seq.*).

Secondly, the provisions governing the method of obtaining reparations, which are similar to those in the Interstate Commerce Act, would be rendered useless and nugatory if the power claimed by the Secretary to make a *nunc pro tunc* order should be accorded to him. "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different." *Baer Bros. v. Denver & R. G. R. R.*, 233 U. S. 479, 486.³ It is not jurisdictional, the Government claims, for the Secretary to fail to consider the evidence. Thus, any unauthorized subordinate might take the evidence and, without looking at it, the Secretary, on the Government's theory, could make an order jurisdictionally impeccable. If directly attacked and invalidated in the courts, the Secretary could announce that he would then consider the evidence. Having done so, he could date his order back, as he proposes to do in this case, to the time when his invalid order was made. Without having filed any reparation complaints, the rate-payers could collect for the period between the two orders from the funds

³In the Interstate Commerce Act as originally enacted in 1887, all orders were enforceable under § 16 in equity by injunction, etc. (24 Stat. 384). Feeling that there was a constitutional right to trial by jury in reparation cases the I. C. C. refused to make reparation awards (*Council v. Western & Atlantic R. R. Co.*, 1 I. C. C. 638). The provision was therefore amended in 1889 to provide for actions at law and trial by jury in all cases where required by the Constitution (25 Stat. 869). The Hepburn Act of 1906 retained the provisions for enforcement by injunction of orders other than for the payment of money and enacted provisions for money awards and suits thereon similar to those which have been incorporated in the Packers and Stockyards Act (34 Stat. 590). Doubtless this history explains why Congress made the distinction in the Packers and Stockyards Act between orders legislative and judicial in nature, but whatever the reason, the distinction is clearly made.

impounded in court as a condition of staying the Secretary's first order. Following the Government's reasoning to its logical conclusion, the Secretary could do better than this. He could make an order without taking any evidence at all, and could, on the Government's theory, successfully assert its jurisdictional validity. Since reparation claims have to be established in the courts after obtaining an order from the Secretary (which constitutes only *prima facie* evidence), the rate-payers would be very foolish to follow the reparations route when the Secretary can take care of them by the more expeditious and certain method suggested by the Government.⁴

The employment of this method suggested by the Government would also render unnecessary the stay provisions of the statute which permit the Secretary to stay the effectiveness of filed tariffs for 60 days only. Since by the simple device of making a "snap order" the Secretary could fully protect the rate-payers, he would never have any occasion to employ the stay provisions.

On June 14, 1933, the Secretary could not have made an order prescribing for the future the rates attempted to be made by the order invalidated by the decision of this Court, or any other order predicated upon the findings con-

⁴Since it is so very plain on the face of the statute that the Secretary cannot make the *nunc pro tunc* order he proposes to make, we have refrained from discussing the serious constitutional points which would be raised were such a construction of the statute possible; that is, whether or not there would be violation of Article III of the Constitution and the Seventh Amendment. Of course, it is elementary that statutes should be interpreted, if possible, so as to avoid serious constitutional questions. *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346; *Blodgett v. Holden*, 275 U. S. 142, 148; *Lucas v. Alexander*, 279 U. S. 573, 577; *Crowell v. Benson*, 285 U. S. 22, 62.

tained in the report and order of the Secretary as of that date. The proceedings having been instituted by the Secretary on his own motion (R. 21), the only power which the Secretary then or now possesses in such a proceeding is to fix rates for the future (Sec. 310). Power to award reparation in respect of charges made prior to the entry of a valid order is expressly withheld by the statute (Sec. 309(c)).

Power to make rates for the future may be exercised under the statute only "after full hearing" (Sec. 310). The Secretary's order was set aside by reason of the failure of the Secretary to accord to the commissionmen that "full, fair and open" hearing which the statute requires. This, the Court said, the Secretary had failed to accord because the order, and the findings essential to its validity upon which it was based, had been prepared by the "active prosecutors for the Government" and accepted by the Secretary without according to the commissionmen an opportunity to be heard thereon. Without departing from what it had said in its prior decision in respect of the service of tentative reports by administrative tribunals, the Court held that under the circumstances disclosed by the record in this case the Secretary was without power or authority to enter the order set aside, because the proposed order and the essential findings upon which predicated had not been served upon the commissionmen, and opportunity afforded to them to file exceptions thereto and to be heard thereon.

It is not to be contended and cannot be contended that on June 14, 1933, any such tentative findings and order had been served upon the commissionmen or any opportunity accorded to them to except thereto or to be heard thereon. On the contrary, on that date the Secretary purported to

enter and serve upon them the final order which the Court has invalidated. The theory of the appellants is that the so-called "procedural" defect may be cured by serving upon the commissionmen as tentative findings and tentative order, the findings and order theretofore entered and served upon them as a final order, and thus accord to the commissionmen the opportunity to except thereto and to be heard thereon, which the Court has ruled should have been accorded to them prior to the entry of any order on June 14, 1933. This having been done, it is the contention of the appellants that the Secretary may then enter in 1938 an order fixing rates for the future, not as of the date of its entry but as of June 14, 1933, or more than five years ago. Whether procedural defects, if any, and what kind, can be cured by *nunc pro tunc* orders of an administrative officer or tribunal, it is perfectly obvious that the order now proposed could not have been made on June 14, 1933. It is equally obvious that any order attempted to be thus predated cannot stand, and that in attempting to pre-date such an order to be made some time in the future, the Secretary would be acting as much outside of his authority as in the entry of the order set aside, because at that time the respondents had not been "apprised of the issues" they were required to meet, had not been served with a tentative report, or been given an opportunity to except thereto or to be heard thereon. By reason of these facts the Court held that there had been no hearing within the meaning of the statute. Hence the Secretary was on that date without power to enter an order reducing the rates and cannot now enter as of that date an order which he was then without authority to make.

Conceding the power of the Secretary to cure the so-called "procedural" defect by fulfilling the requirements of

the law through the service of his old findings and order, or any other findings and order which he may see fit to make, and affording to the respondents the right to except thereto and to be heard thereon, and having thus cured the so-called "procedural" defect to enter an order fixing rates for the future upon the evidence then before him—provided the record is not now too stale to support such an order (*Atchison, Topeka & Santa Fe RR. Co. v. United States*, 284 U. S. 248), or is properly supplemented, it is obvious that the requirements of a full hearing will not have been met until (1) the service of such a tentative order; (2) the submission of exceptions thereto; and (3) due and impartial consideration of the case *de novo* by the Secretary, as thus presented. None of these steps had been taken or could have been taken prior to the decision of this Court setting the old order aside. Conceding to the Secretary, therefore, authority to cure the so-called "procedural" defect, a full hearing will not have been had until all of these steps have been completed, and then, and then only, and from the date of the Secretary's determination of the issues *de novo* can an order fixing rates for the future be entered.

It is little short of ridiculous to suggest that the requirements of this Court's decision in this case can be met by the entry of a *nunc pro tunc* order. The absence of a full hearing at the time the order was entered cannot be supplied retroactively by according to the respondents the right to a full hearing now. Only after such a hearing has been had may the Secretary exercise the power conferred upon him to fix rates for the future. Since on June 14, 1933 the respondents had not been accorded a full hearing, the Secretary could not, under the facts of this case, have entered the order now proposed to be made *nunc pro tunc* as of that

date. Indeed, if the report and findings, and the Secretary's order then entered as a final order, had on that date been served upon the respondents, the Secretary could not have entered an order as of that date because the requirements of a full hearing as laid down by this Court in its decision could not have been met until the respondents had been given an opportunity to except thereto, and the Secretary had reached an independent judgment by a consideration of the case *de novo* in the light of the objections taken and the exceptions urged.

That the Secretary may not now enter a *nunc pro tunc* order as of June 14, 1933, or as of any other date, but only an order dated as of the time when actually made fixing the rates for the future, is also made manifest by a further consideration of the powers and duties of the Secretary as defined by the statute and the decision by this Court in this case. If by now serving the old report and findings upon the respondents, and giving them an opportunity to except thereto, it is the predetermined purpose of the Secretary to adopt the old findings and reenter the old order for the purpose of "validating" it, as indicated in the appellants' petition for rehearing to this Court (p. 14), then the case has already been prejudged and the Secretary's attempted effort to cure the "procedural" defect a mere sham. If such be the Secretary's purpose, then any order made in its pursuit would be as invalid as the old one and subject to the same infirmities.

If, on the other hand, it is the purpose of the Secretary to give impartial consideration to the exceptions and objections taken to the formal findings and order now served as a tentative report, then clearly there will have been no hearing until the Secretary determines the issues thus raised

and reached an informed judgment thereon. There can be no valid findings or order until his conclusions are embodied in a new report. As the Court declared in its prior decisions in this case, the order must be supported by findings essential to its validity, which, in turn, must be supported by evidence. The Secretary may not consider those matters which he should not consider, and must consider those matters which he should consider. Moreover, as said by the Court in both of its prior decisions in this case, the findings must be those of the Secretary himself and not those of his subordinates. Such are the duties of the Secretary, and no valid order may be made for the future until they have been exercised. They had not been exercised on June 14, 1933. They have not been exercised now. They cannot be exercised until some time in the future. Until they are exercised, no order may be made; and such order, when made, can speak only as of a date after their exercise and not before.

Again conceding, provided the old record has not become stale, or can in some way be adequately supplemented, that the Secretary may, in the proceeding instituted in 1930, make an order fixing rates for the future, one of three things may occur: He may, after performing for the first time the duty which the statute casts upon him and which the Court has unmistakably said he had not performed, reach, after having accorded to the respondents the hearing previously denied to them, the same conclusion which he reached before. Only in that event, even on the appellants' theory, could the Secretary enter any order *nunc pro tunc* which would affect the impounded funds. He may, after having for the first time accorded to the respondents that "full hearing" without which no order may be made,

conclude that the rates under investigation were not unreasonable and hence let them stand. Or, he may find that those reasonable rates to be prescribed for the future lie somewhere between the rates in effect at the time the proceeding was instituted and the rates prescribed by the order which has been set aside. Unless, as we have said, we are to assume that the case has been predetermined, and that its reopening for the purpose of giving consideration thereto is a mere sham, then it is clear that at the conclusion of the reopened proceedings the Secretary must consider, wholly independently of his prior order, whether the rates to be prescribed for the future shall be those under investigation, those prescribed by his previous order, or something else. Unless and until he determines these questions, he has not performed the duty cast upon him by the statute, the hearings are incomplete, and no order can be made.

Boiled down to its simplest terms, therefore, the contention of the appellees is that the Secretary may not make a *nunc pro tunc* order purporting to speak as of June 14, 1933, which he could not have made at that date. This is so even if, after according to the respondents the full hearing previously denied, he reaches the conclusion that if he had been in the position on June 14, 1933—which the Court has said he was not—to fix for the future the rates prescribed in the invalid order of that date, he would have done so. To accept such a view of the Secretary's powers would be to deny to the respondents in substance that right to a full, fair and open hearing *preceding* determination by the Secretary, without which, the Court has said, any order entered by him is a nullity.

The vice in the old order was that the findings upon which the order was predicated and which had been prepared by the "active prosecutors for the Government," were accepted by the Secretary without opportunity to the respondents to be heard in respect thereto. It is little short of absurd to suggest that by a re-adoption of these findings *after* hearing the Secretary may date them back to the date of the old order *before* hearing. We know no theory upon which the right either of a court or of an administrative body to enter a *nunc pro tunc* order can be extended to a case where no order could have been lawfully made as of the date from which it is attempted to be given effect.

4. Neither the *Atlantic Coast Line* case nor the other authorities cited by the appellants are in point.

The main authority upon which the Government seems to rely in arguing its claim that the Secretary is now empowered to validate his invalid order of June 14, 1933, as of that date, is *Atlantic Coast Line v. Florida*, 295 U. S. 301. This case presents a state of facts and lays down a rule of law so utterly different from the state of facts in our case and from any rule of law that can properly be applied to them that the weakness of the Government's argument is well demonstrated by its strong reliance on the case.

This Court in that case divided five to four. It is the majority opinion from which the Government purports to derive comfort. Even a casual examination of that opinion discloses its utter inapplicability to our situation. There the question was whether the *Atlantic Coast Line* could equitably retain collections which it was forced to make by reason of an order of the Interstate Commerce Commission increasing, because discriminatory against interstate

commerce, intrastate rates which had been fixed by the Florida Railroad Commission. The order of the I. C. C. was upheld in the statutory court. This Court reversed because, although discrimination against interstate commerce had been found by the Commission, it had neglected to make the necessary findings to support this ultimate conclusion (282 U. S. 194). During a period of about two years between the time that the Commission made its order and this Court set it aside the Railroad had collected the higher rates. Mr. Justice Cardozo, in his opinion for the majority, expressly stated (p. 315) that the question was not whether the Railroad, if it had given credit to the shippers, could now legally collect the higher rates from them, but that the sole question was whether it was equitable under all the circumstances to compel the Railroad to disgorge to the shippers. In determining that it was not, the majority felt that the equities were such that the courts ought not to take affirmative action.

In the first place, the learned Justice said (p. 313) that the rates fixed by the Florida Railroad Commission had been shown to be so low as to be confiscatory, so that the Railroad was entitled to higher rates.

In the second place, it appeared in the record that, after hearing more evidence and making new findings, the Interstate Commerce Commission had actually issued an order fixing the same rates for the future as it had fixed in its prior order, making the necessary findings to support the ultimate finding of discrimination. This Court held this second order of the I. C. C. to be valid (292 U. S. 1). *Such an order has, of course, not been made in our case and may never be made.* But if it should be, this would have no significance at all because of another vital difference between the

cases. At page 316 of his opinion, Mr. Justice Cardozo says:

"The court surveys the years and discerns the same injustice, dominant at the beginning as well as at the end. Indeed, nowhere in the record is there a suggestion on the part of any one that during this long litigation there has been any change of conditions whereby a discrimination against interstate commerce illegitimate at one time would be innocent at another."

This furnished an additional equity in favor of the Railroad. Such an equity, assuming contrary to fact that equities are to be balanced in our case, is completely lacking in our case. The Secretary's order of November 1, 1937, increasing rates, is based upon an admission of changed conditions, and appellees do most emphatically claim a change of conditions during the period 1933-1937, as an affidavit filed by them with the Secretary shows (Appellants' Bf., p. 98). It is indeed common knowledge that during a period when the administration was widely heralding its desire to raise prices and when serious droughts occurred, very considerable changes in the selling prices of livestock, in the quantity of shipments made, and other factors affecting the reasonableness of commission rates took place.

A further equity noted by the learned Justice, and probably the crucial one, was the fact that the Railroad had no choice but to collect these higher rates under the compulsion of an order of the I. C. C. and an order of the statutory court refusing to set it aside.

The writer of the Government's brief, in making use of this case, immediately makes the blithe assumption that the Secretary in the reopened proceedings before him, now

incomplete,⁵ will make the same order and fix the same rates as he did in his invalid order on June 14, 1933; in other words, that he will listen to the argument of the market agencies upon their exceptions as a matter of form and will arrive at the same conclusion, as may, of course, easily be done because there are absolutely no criteria or standards in the Act to govern the determination of reasonable rates.⁶

The above considerations make the case absolutely worthless for the Government. But it is further assumed that mere failure to indite detailed findings after having accorded a full hearing is equivalent to having denied a full hearing, although the detailed findings may in fact have been arrived at by the Commission despite the fact that they were not inserted in its order. In our case it will be remembered that this Court invalidated the Secretary's order because of a "vital defect" and not a mere "irregularity in practice."

But more fundamental, perhaps, than all of the above considerations is the fact that the occasion is completely lacking in our case for the application of any doctrine of balancing the equities. The court has no power to hold impounded funds after the cause before it has terminated. The impounded funds belong, and always have belonged, to the market agencies and were deposited only as security

⁵This appears even if the facts stated in the extensive excursion *dehors* the record in appellants' statement (pp. 5-6, 7-9) are considered. This essential link in the chain is attempted to be supplied in a most absurd way; that is, by assuming that because the Secretary in an invalid order purported to find appellees' rates to be unreasonable (which findings it is incorrectly stated the District Court approved), they were in fact unreasonable.

⁶Indeed, the Government has consistently argued that the Secretary is free to make any rates he pleases so long as he considers all the relevant factors. We only suggest at this time that such a statute may not be immune to attack upon the ground of illegal delegation of legislative power.

to await an event which did not happen—the upholding in the courts of the Secretary's order. By the unambiguous terms of the temporary impounding order, they were entitled to have them back upon the Secretary's order having been declared invalid.

So much for the majority opinion. Four members of this court dissented. The fundamental basis of the dissenting opinion is that restitution was due because the finding of discrimination in the second order could not for any purpose relate back to the time of the original order which was void, and that whether void or voidable, the order gave the Railroad no right to collect the sums exacted. To so hold, in the opinion of the minority, would permit interference by the Federal Government with, and nullification of action in, a field exclusively within the State of Florida's sovereign power. The minority thought that equitable considerations had no place in the case because not to grant restitution would be, in effect, to deny legal rights.

It matters not, therefore, whether the majority or minority opinion is taken to be the law. It cannot even be disputed but that the market agencies collected the impounded funds under validly filed tariff rates which were maintained in effect by the temporary restraining order of the court. The demand of the Secretary, on behalf of the rate-payers who have never been parties to this case, to have the court retain these funds so that, by validating his order, he may have them repaid to the rate-payers, is sup-

⁷This is a highly dubious claim. Of course when a bond is given against an administrative order being held valid, and it is held valid, the Secretary is the public representative of the intended third party beneficiaries. In this case, however, the attempt is to impeach the substitute for the bond, to wit, the impounding order, and not to collect upon it.

ported by no equities at all. Nor, if it were, would it make any difference, because the case is not one that calls for any balancing of the equities. The question simply is as to whether the market agencies are legally entitled to have their security back when the event has failed to occur against which they gave this security. As we have heretofore conclusively demonstrated, the argument that substantive rights can be enforced without complying with the fundamental procedural provisions of the Act will not wash. This being so, there is no argument left to support the claim of appellants to any rights or potential rights in the impounded funds.

Two decisions of the Appellate Division in New York, an intermediate court, are cited by appellants as authority for their position. Whether or not these cases are correct in view of the provisions of the New York Public Service Law and of the Civil Practice Act regulating the review upon certiorari, which completely differ from the provisions of the Packers and Stockyards Act, is hardly a matter for discussion in this brief, or one which the court will be likely to care to resolve. We undertake, therefore, only to point out a few very obvious differences. In the first place, as the Government admits, the review in these cases was direct by certiorari, and as the Government further admits in its brief there was express authority to remand the case directly to the administrative agency (p. 47). There is no such authority here, either express or implied, and the relationship between the statutory court and the Secretary of Agriculture is very different from what in New York under its statutes is the relationship between the courts and the Public Service Commission. A completely conclusive difference, however, lies in the contrast between Section 113 of the Public Service Law and the provisions of the Pack-

ers and Stockyards Act. The section referred to provides in part as follows:

"§ 113. *Reparations and refunds; actions.* Whenever a public utility company, on its own initiative, shall file with either commission a schedule stating an increased rate or charge, and the commission shall enter upon a hearing concerning the propriety of such increased rate or charge, the commission shall by order require the interested company to keep accurate account during the pendency of the hearing, in detail, of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may, on application, by order require the interested company to refund, with interest, on or before a day fixed in the order, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified: * * *"

Thus it is plain that the Public Service Commission of New York acting on its own motion can award reparation whereas the Secretary of Agriculture cannot. This difference is, of course, vital. But as a matter of fact in neither New York case did the court declare that it was bound to direct a new hearing and retain the impounded funds pending its taking place. The action of the court in both cases was in pursuance of its discretion, a discretion which the statutory court in our case refused to exercise in favor of the appellants. Lastly, if anything more need be said, it does not appear in either of these cases that the matter of impounded funds was before the court at all, in one of the cases the security having been deposited with a lower court and in the other with the Public Service Commission.

Finally, it appears that the Government relies heavily upon the cases of *Mahler v. Eby*, 264 U. S. 32, and *Tod v. Waldman*, 266 U. S. 113. It is plain that these cases are of no significance. The order which the Secretary of Labor would make in the future in these deportation cases certainly was to have no retroactive effect. It was merely to carry out the deportation of the aliens. Further, it was to be judicial, not legislative, in character. In addition to this, what a court may do with respect to conditioning its decree in a *habeas corpus* proceeding, in which a prisoner is seeking his freedom, is entirely different from what a statutory court limited by its statutory powers to setting aside an administrative order, may do.

V.

Whether or not the rate-payers are now barred from obtaining reparations has nothing to do with the merits of this appeal and is a question extrinsic to the record.

Upon the wholly unwarranted and unsupported assumption⁸ that the rate-payers have paid unreasonably high rates to the market agencies during the period June 14, 1933, to November 1, 1937, much of the Government's brief is devoted to an argument to the effect that the Court should strain every nerve to make the rate-payers whole.

Now, it is very plain that the courts have no power under this statute to protect the rate-payers generally against the consequences of their or the Secretary's failure to follow

⁸The entire basis for this assumption is the invalid order of the Secretary and the invalid action of the statutory court in sustaining it until directed by this court to invalidate it.

the essential procedural requirements of the statute. All that the statutory court can do is to provide, by insisting upon a bond or impounding, that rates higher than those provided for in an order of the Secretary shall not be finally reduced to possession until the order of the Secretary has been declared invalid. Under the statute the rate-payers had it fully within their power to protect themselves if they did not wish to rely solely upon the validity of the Secretary's proceedings instituted upon his own motion. They can file reparation claims with the Secretary within ninety days of the arising of the cause of action. In this case, however, they did not choose to follow that procedure. They chose to rely solely upon the impounding and upon the ultimate validity of the Secretary's order. Having done so, they have no complaint if their reparation claims are now barred.

The Government, however, insists that the reparation claims are not barred. The argument presented is ingenious, even if fallacious, but the point is not material. Whether or not these claims are barred does not affect the lack of power of the Secretary to make a *nunc pro tunc* order; nor the lack of power in the Court to hold the impounded funds while he proceeds to do so. Nor can it overcome the plain terms of the temporary restraining order which require that the funds be returned at this time.

Moreover, all talk of reparations is entirely beside the point until there has been a valid finding that the rates collected by the market agencies were unjust and unreasonable. There has been no such finding. The invalid order of the Secretary has no bearing at all upon this question. Obviously, neither has any finding of the District Court purporting to approve that order, whether on the basis of

the weight of the evidence or on the existence of substantial evidence, any continuing effect, now that its decrees have been reversed. As a matter of cold fact, however, the District Court held that the weight of the evidence on the two most important factors in the case, to wit, "salesmanship performance" and "business-getting and maintaining," was contrary to the findings of the Secretary (R. 241).

Notwithstanding the clearly indisputable facts set forth above, the Government continually talks about the necessity of the existence of some remedy in the rate-payers. This idea no doubt arises from unexpressed subconscious notion either that the Secretary's order, although declared invalid by this Court, was really valid, or the idea that the Secretary, from motives of self-justification, is bound to "validate" it in the reopened proceedings.

But the argument need not be continued. The question is not whether the rate-payers were ever entitled to reparations or whether they are now entitled to reparations; the question is what the Secretary can do when acting upon his own motion. It is clear that he cannot make a *nunc pro tunc* order having the effect of awarding reparations, whatever the situation of the rate-payers with respect to reparations may be.

It would seem to be evident, therefore, that the sole purpose of the argument to the effect that reparation claims are not yet barred is to persuade the Court that a ground of *equitable jurisdiction* exists, to wit, the prevention of a multiplicity of suits, and to induce the Court to conclude from that, despite the clear purpose of the temporary restraining order's provision for impounding, that an *equitable right* exists to have the impounded funds preserved in court for the benefit of the rate-payers. It is

hardly to be supposed that the Court will be deceived by such a transparent device.

VI.

The affirmance of the lower court's decision will result in no injustice and will in no way hamper the proper carrying on of administrative proceedings. Moreover, the consequences of any other decision in this case would be absurd.

There are some very simple answers to appellants' insistent argument with relation to the feared effect upon the conduct of administrative proceedings, if the lower court's order is affirmed. This matter of preventing the distribution of the impounded funds is, of course, an afterthought. Most certainly it was not conceived of at the time the temporary restraining order was issued because, if it had been (assuming the court has any power at all in the premises) the contingency might have been provided for. We need not speculate precisely how; but temporary restraining orders can be conditioned in various ways. The appellants take the position that "Any rule which extended immunity from regulation, if only the administrative agency could be convicted of procedural error, would immeasurably increase its burdens." The danger that the administrative tribunals would be forced to accede to the far-fetched demands of ingenious counsel, even though patently unsound, is suggested. The fact that in this case the exceedingly reasonable demand of counsel for a tentative report was refused, is ignored, even though the findings and order of the Secretary could easily have been used

as a tentative report as, in fact, they are now being used; and, further, even though the practice of tentative reports had been employed for years, with the approbation of this Court, by the oldest administrative tribunal, the Interstate Commerce Commission.

Thus, the Secretary, by refusing a tentative report or its equivalent by failing in any way to give proper notice of the issues or the Department's claims and contentions, denied what this Court has termed a "rudimentary requirement of fair play" and one which had been for many years a well-recognized part of orderly administrative proceedings. And this, although specifically demanded and perfectly convenient to accord. The Secretary also violated an equally well-known and fundamental right of litigants; that is, that the judge shall not confer with their opponents in secret without giving them the opportunity to answer. It is doubtful whether a member of the Bar could be found who would not realize the impropriety of this. Lastly, although the statute clearly delegated the deciding power to the Secretary and not to the Department, the Secretary failed to consider the evidence or to make the findings.

But aside from the fact that administrative tribunals need not anticipate difficulties in the courts if they will conform to the simple and well-recognized requirements of every-day fair play and justice as it is being administered in the courts, there is a simple but complete answer to appellants' contentions. Proceedings by the Secretary on his own motion are made by the statute purely prospective. The power to make prospective orders is supplemented by the power to stay tariffs filed by market agencies for a period of sixty days (Sec. 306(e)). It is also supplemented by granting the right to rate-payers to file reparation com-

plaints within ninety days from the time the cause of action arises. It may be that these times are too short, in view of the complexity of this particular type of proceeding; but one cannot quarrel with the statute which, after all, is what the Government is doing. If the Secretary feels that his legal staff cannot properly advise him as to the law relating to demands made by opposing counsel, he can enter a stay or in more involved proceedings suggest the filing of reparation complaints which will fully protect the past.

If, however, the doctrine argued for by the appellants should be adopted, the consequences in a case like this would be absurd.

Appellants' bald contention is that the statutory court had no power to order the return of the impounded funds to the market agencies which had deposited them as security to make refunds upon the happening of an event which failed to happen, to wit, a holding by the courts that the Secretary's order was valid. The claim is that these impounded funds *must* be held by the statutory court until such time as the Secretary may make a further order in the premises and until such further time as this order is either held valid in the courts or invalidated by reason of the fact that the Secretary's findings necessary to support the order are not supported by substantial evidence. This latter concession we feel to be a generous one, because it might equally well be argued that the Secretary in his prosecuting capacity should have a reasonable opportunity to develop evidence to support any findings lacking substantial support in the evidence already taken. He could then, if the evidence were obtained, re-assume his judicial capacity and make his order invulnerable against attack in the courts.

Overlooking, however, this rather serious consideration, and further overlooking the utterly specious distinction

between invalidation of an administrative order for fundamental "procedural" errors and invalidation "on the merits," let us consider what would happen if the Government's argument should be adopted. It is immediately obvious that by committing "procedural" errors the Secretary could keep these funds impounded not only throughout a second administrative proceeding, but indefinitely; because each time he received the case back he could in some respect deny a full hearing. When attacked in the courts, his order would be invalidated; but he could always insist upon another chance. Thus, it would follow that the market agencies could never get their impounded funds returned except at the pleasure of the Secretary.

Lastly it may be said that in one exceedingly important respect administrative tribunals are utterly different from courts. They combine the essentially antagonistic functions of prosecutor and judge; and as the decision of this Court in this very case plainly shows, they are subject to the strong temptation to improperly intermingle them, thereby doing great injustice to those whose activities they are authorized to control. If the doctrine contended for by the Government in this case should prevail, it would mean that at the pleasure of an administrative tribunal citizens could be compelled to bear the burden of an indefinite number of administrative proceedings.

The Secretary, of course, by the tenor and tone of the argument made for him by his counsel, seeks to assure this Court that he has learned his lesson and that appellees are certain to receive their full legal rights in the reopened proceedings before him. These proceedings are not a part of the record in this case, although the Government has seen fit to discuss in its brief (pp. 7-9) even proceedings which

have taken place since the allowance of this appeal. This having been done, we feel free to suggest that the Secretary, in his headlong rush to "validate" his prior order, has already made errors seriously prejudicial to the rights of appellees. Although he has appointed an examiner to take evidence concerning changed conditions in the years 1933-1937, he has refused to set aside the findings made on June 14, 1933, and invalidated by this Court (p. 98). He has required that the market agencies except to these findings and make argument before the examiner with respect thereto (p. 99). Apparently they are to be regarded as *prima facie* correct. In prescribing this procedure, moreover, he has rendered an opinion, after refusing to hear argument expressly demanded by the market agencies, in which he gives them a thirty-day period to take exceptions and point out any considerations overlooked by him (p. 99). Without waiting for the expiration of this thirty-day period, and over the protest of the market agencies, his examiner proceeds with the hearing and insists upon following the procedure laid down in this opinion (pp. 8-9). Thus, irrespective of his power to make a *nunc pro tunc* order, it would seem that the Secretary is well on his way toward the making of another invalid order.

It is argued that the doctrine requiring the exhausting of the administrative remedy before resort to the courts requires that the market agencies exhaust themselves in this further administrative hearing. And, of course, if the Secretary's second order be declared invalid, that they exhaust themselves in a third administrative proceeding. Coupled with the claim that the Secretary can make a *nunc pro tunc* order, this means that, no matter how many "procedural" rights are denied to the market agencies at the

behest of the Secretary's prosecuting arm, and no matter how fundamental these rights are, they can always be corrected *nunc pro tunc*—no matter how many administrative proceedings it takes to do it.

In other words, instead of an administrative tribunal's being compelled to grant to citizens whose activities it is investigating a full measure of their statutory rights, it may grant them as few as it desires, secure in the knowledge that, upon the inevitable invalidation of the administrative order in the courts, the "procedural slip" can always be corrected *nunc pro tunc*. Indeed appellants go further. They even suggest that when this Court has invalidated an order of an administrative tribunal for lack of evidence to support essential findings, the administrative tribunal may insist upon the *status quo* being maintained and the proceedings being reopened in order that it may go out and find the evidence. Having done so, it may then make an order *nunc pro tunc*. The consequences of the acceptance of such a doctrine upon the functioning of administrative tribunals may well be imagined.

PART TWO

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

VII.

This appeal, not being from "a final judgment or decree," but from a mere ministerial order which, upon the termination of the cause, was required by the unambiguous terms of a non-appealable temporary restraining order, this Court lacks jurisdiction.

1. The statute limits appeal to a "final judgment or decree." Since the order appealed from is not a "final judgment or decree," but is a mere ministerial order or direction to the Clerk authorizing the return of impounded funds such as was required by the unambiguous terms of a non-appealable temporary restraining order, which order or direction merely restores the *status quo ante* the temporary restraining order, this Court lacks jurisdiction.

Appellees here, who were petitioners below, applied to the statutory court for three types of relief against the enforcement of the Secretary's order: first, a temporary restraining order; second, a temporary injunction; and third, a permanent injunction (R. 17-18). A temporary restraining order, requiring the impounding as a condition, was granted to them upon the basis of their petition and in accordance with the statute (R. 129). Throughout the entire litigation this temporary restraining order or extensions thereof have remained in force with the acquiescence

or consent of the Government (R. 129, 130, 181). There was, therefore, never any necessity to press the demand for a temporary injunction.

The fundamental basis of the temporary restraining order, as recited therein, was "the right of the petitioners to collect rates and charges for stockyard services rendered under the schedule of rates and charges or tariffs now on file by petitioner with the Secretary of Agriculture" (R. 129). The order recites (R. 129):

"that immediate and irreparable damage will result to petitioner"

unless an order

"staying and suspending the enforcement, operation and execution of the order of June 14, 1933, of the defendant, Secretary of Agriculture, issue against the defendants."

This immediate and irreparable injury and damage is stated in the temporary restraining order to consist of two things: (1) that the Secretary of Agriculture will proceed to enforce the penalties provided for violation of said order by the Packers and Stockyards Act of 1921, and (2) will "otherwise proceed in derogation of the right of the petitioner to collect" the rates and charges in the filed tariffs. Thus, it is said (R. 129) that:

"In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to petitioner."

The Court therefore enjoins the Secretary of Agriculture and his agents from enforcing his rates in derogation of or

"in any wise militating against the right of the plaintiff to collect, demand, receive and retain rates and charges for stockyard services at the Kansas City Stock Yards in accordance with the schedule of rates and charges of petitioner now on file with the Secretary of Agriculture, provided, however, that the petitioner shall deposit with the Clerk of the Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect *and pending final disposition of this cause*, the full amount by which the charges collected under the schedule of rates in effect exceeds the amount which would have been collected under the rates prescribed in the order of the Secretary" (R. 130).

The statutory scheme of the Packers and Stockyards Act of 1921 is similar to that of the Interstate Commerce Act. Section 306 requires every market agency at a public stockyard to file and publish "schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard." It further provides:

"No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public * * *."

It further provides that

"Whenever there is filed with the Secretary any schedule, setting a new rate of charge, * * * the secretary may either upon complaint, or upon his own initiative without complaint, * * * enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon

filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; * * * If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, *the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.*" (Italics ours.)

Civil and criminal penalties are provided for failure to charge tariffs which have been duly filed and have become effective (Sections 306, 307 and 308).

The Secretary of Agriculture never at any time stayed, or attempted to stay, the effectiveness of the tariffs filed by the market agencies. They went into effect May 11, 1932 (R. 2), and have been in effect throughout the entire period of this litigation, subject only to the obligation to make refunds equal to the excess collections in the event the Secretary's rates should be held valid. The temporary restraining order expressly prevented the Secretary's rates from going into effect and expressly protected the filed rates against interference. When the Secretary's rates were held invalid, no obligation to refund for the period of the impounding could ever thereafter exist.

The only appeals permitted by the statute to this Court are (1) from the granting or denying of a temporary injunction, and (2) from a "final judgment or decree." As

has been stated above, no temporary injunction ever issued in this case. On July 9, 1937, the statutory court entered its final decree which was appealed to this Court and reversed. This decree merely dismissed the petitions and made no provision for refunding (R. 180). This Court, for this reason we presume, refused to deal with the matter.

What comes before this Court now is not any "final judgment or decree," but a mere ministerial order or direction to the Clerk to release impounded funds belonging to appellees and which have always belonged to them. Such an order is not appealable. *Cf. Blossom v. The Milwaukee, etc. R. R. Co.*, 1 Wall. 655. This order merely carries out the unambiguous intent of the provisions of the temporary restraining order. Were there any question as to the construction of these provisions, however, the matter would not be one for this Court. The temporary restraining order was indisputably non-appealable; and if the appellants were dissatisfied with its terms their remedy was to insist on bringing on the motion for a temporary injunction, from the order granting which they could have appealed.

2. The order appealed from, unlike the decree in the *Baltimore and Ohio* case, is not a decree resulting from an equity proceeding in which one party has asked restitution from the other, but is a mere ministerial order or direction to the Clerk, upon the occasion ceasing for the maintenance of security, to return moneys belonging to a litigant.

In the *Baltimore & Ohio* case (279 U. S. 781) the east side (of the Mississippi) roads had been compelled, by the statutory court's refusal to set aside the I. C. C.'s order, to absorb charges for carriage across the Mississippi River

which, as this Court held, should be absorbed by the west side roads. The lower court construed the judgment of this Court as applying only to the future and requiring no restitution for the year or more the east side roads had been wrongfully compelled to absorb these charges to the benefit of the west side roads. Thereupon, a proceeding was brought in the lower court by the east side roads against the west side roads for restitution. The court denied restitution and this Court reversed. In every sense of the word this was an equity proceeding leading to a final decree ordering the west side roads to make the east side roads whole.

Our case is utterly different. With the issuance of the non-appealable temporary restraining order that equity proceeding, in which the deposit of the impounded funds was made, was brought to a conclusion. This temporary restraining order would have expired by limitation had the Government not acquiesced in its extension throughout the entire litigation. The impounding could only have been continued under a temporary injunction, the granting of which would have been appealable. When pursuant to this Court's mandate the statutory court entered its decree for a permanent injunction against the Secretary's order of June 14, 1933, the temporary restraining order was no longer required. All there remained for the court to do was to restore the *status quo* by returning to the market agencies the impounded funds put up as security for something which never happened, to wit, a holding in the courts that the Secretary's order was valid. Such a ministerial order, direction or instruction to the Clerk is certainly not a final decree in an equity suit. The terms of the temporary restraining order are unambiguous and obviously are subject to no other construction but one requiring, when such

temporary restraint is no longer needed; the return of the impounded funds which were deposited as a condition of obtaining the temporary restraining order. But were there ambiguity, it would be too late for appellants to complain. Having acquiesced in the impounding continuing pursuant to a non-appealable temporary restraining order and never having insisted upon the market agencies applying for a temporary injunction from which an appeal could be taken, they are now foreclosed.

3. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is strictly consistent with the mandate of this Court. In reality, however, it was not required by the judgment or mandate of this Court, which reversed a decree containing no provision relating to the impounded funds, but is an order to which appellees became immediately entitled when the judgment of this Court absolved them from the necessity of maintaining a temporary restraining order in force.

In the *Baltimore & Ohio* case (279 U. S. 781), after this Court had reversed the decree of the lower court refusing to set aside the I. C. C. order requiring the east side roads to absorb the trans-Mississippi charges, the lower court entered a decree denying restitution, which decree failed to carry out the full intention of this Court's judgment and mandate. In our case the decree of July 9, 1937, which was appealed from and which this Court reversed, made no provision whatsoever concerning the impounded funds. It merely decreed that the petitions for injunction should be dismissed. Thus, this Court did not have before it any question concerning the impounded funds. Although upon petition for

rehearing it was specifically requested by the Government to include a direction in its mandate concerning the impounded funds, this Court expressly refused to do so.

From the foregoing it is obvious, therefore, that the lower court's order releasing the impounded funds cannot possibly lack conformity with the mandate of this Court. It is wholly consistent with it, although it does not, properly speaking, flow out of it. In truth, it flows out of the lack of further necessity for the temporary restraining order by reason of the granting of a permanent injunction.

4. The order appealed from, unlike the decree in the *Baltimore & Ohio* case, is not a decree which is part of or incidental to the appealable final decree in the main suit; it is a mere ministerial order, direction or instruction to the Clerk incidental to the termination or the dissolution of a non-appealable temporary restraining order.

In the *Baltimore & Ohio* case (279 U. S. 781), one of the three reasons given for sustaining the jurisdiction of this Court was that the decree appealed from was incidental to and a part of the main suit. While we think it clear that this reason can not be considered apart from the other two, it seems rather plain that it does not apply to our situation in any event. In the *Baltimore & Ohio* case the auxiliary decree of restitution was intended by this Court to be made by the lower court as an integral part of its decree deciding that the east side roads should not be required, but had been required, to absorb the trans-Mississippi charges to the benefit of the west side roads. Since this Court's decision was not only that this absorption should not be required for the future but that restitution should be made for the past, it is obvious that the

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two decrees were part of one whole. In our case, however, the non-appealable temporary restraining order was not a part of the appealable decree which refused a permanent injunction. The funds impounded as a condition of obtaining the temporary restraining order are not even mentioned in that decree (R. 180). The order appealed from which released the impounded funds is in turn not a part of or incidental to the main suit but is a part of, and incidental to the non-appealable temporary restraining order.

Even, therefore, assuming that this reason given in the *Baltimore & Ohio* case can be taken out of its context and separately employed, it is clear that this Court fails of jurisdiction.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed or in the alternative that the order of the statutory Court should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
JOHN B. GAGE,
Counsel for Appellees.

THOMAS T. COOKE,
Of Counsel.

APPENDIX

Packers and Stockyards Act of 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64,
42 Stat. 159, et seq.)

Title III.—Stockyards

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.¹ It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

¹Amended by an act of Congress approved May 5, 1926.

comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less

than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a

stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or han-

ding, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

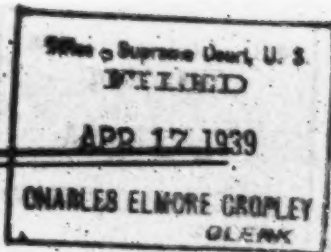
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 221.

THE UNITED STATES OF AMERICA and the
SECRETARY OF AGRICULTURE,

Appellants,

against

O. MORGAN, doing business as F. O. MORGAN
SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

BRIEF FOR APPELLEES UPON
REARGUMENT

FREDERICK H. WOOD,
JOHN B. GAGE,
THOMAS T. COOKE,

Counsel for Appellees.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

THE UNITED STATES OF AMERICA and the
SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O.
MORGAN SHEEP COMMISSION COMPANY,
et al.,

Appellees.

No. 221

**BRIEF FOR APPELLEES UPON
REARGUMENT**

OPINION BELOW

The opinion upon the order appealed from (R. 200-203), which was made and entered June 18, 1938, appears at R. 248 and is reported in 24 F. Supp. 214.

JURISDICTION

On October 10, 1938, this Court noted probable jurisdiction and postponed consideration of the motion to dismiss or affirm to the argument on the merits. The Government relies for jurisdiction upon Section 47a, Title 28 U. S. C. (Act of October 22, 1913; c. 32, 38 Stat. 220), which Section 318 of the Packers and Stock Yards Act,

1921 (7 U. S. C. § 217) makes applicable. Section 47a permits a direct appeal to this Court only from a "final judgment or decree" of the statutory court.

It is our contention, previously argued in Point I of our brief in opposition to application of appellants for a stay and supersedeas pending appeal and in Part Two of our brief upon the original argument, that the appeal is not from a "final judgment or decree", but from a ministerial order appurtenant to the liquidation pursuant to its terms of a temporary restraining order, which as this Court's decision in *Morgan v. U. S.*, 304 U. S. 1, 23, setting aside as invalid an order of the Secretary of Agriculture, has conclusively shown, was providently issued.

STATEMENT

On April 7, 1930 the Secretary of Agriculture instituted *on his own motion* an inquiry into the "reasonableness and lawfulness of all rates and charges * * * of the respondent market agencies at the Kansas City Stockyard, Kansas City, Missouri (most of which are appellees upon this appeal) * * * as set forth in their tariffs and supplements thereto" as "*theretofore filed*" with him (R. 21).

On June 14, 1933 the Secretary entered an order commanding the market agencies on and after thirty days from said date to cease and desist from publishing or collecting charges in excess of those prescribed in said order, and to publish and file with the Secretary, as required by the Packers and Stock Yards Act, a schedule of charges conforming to those prescribed by the Secretary's order as just and reasonable for the future, within ten days prior to its effective date (R. 94-95).

His order did not direct payment of reparation on past shipments. *The statute expressly forbids the Secretary from making any order for the payment of money in any proceeding instituted before him on his own motion* (Packers and Stock Yards Act, Sec. 309 (c)).

On July 5, 1933 the appellees petitioned for rehearing, which was denied on July 6, but the effective date of the Secretary's order was extended to July 24, 1933 (R. 3, 131).¹

On July 19, 1933 each of the market agencies brought a separate suit to set aside the Secretary's order, all of which suits were subsequently consolidated for trial. On July 22, 1933, a temporary restraining order was entered in each of said separate causes restraining the enforcement of the Secretary's order until further order of the Court (R. 129), conditioned in each of said causes upon the impounding of the difference between the market agency's old charges, continued in effect by the restraining order, and the charges fixed in the order issued by the Secretary, "pending final disposition of this cause" (R. 130). These temporary restraining orders were continued in effect until the simultaneous denial of temporary and permanent injunctions, and the restraint, so conditioned, was renewed pending appeal (R. 130, 171, 181).

On November 25, 1933, some four months after the commencement of the suits, the appellants answered (R. 31). The case was submitted before the summer adjournment. Final decree dismissing the bill was entered on De-

¹On November 1, 1937 the Secretary's order of June 14, 1933 was superseded by another order made in the same proceeding by which other and higher rates to be thereafter charged were approved (R. 193).

ember 20, 1934 (R. 137). Drawn by the Government, it recognized that the impounded funds were deposited as security only and belonged to the market agencies subject to the obligation to refund equivalent amounts to the shippers. Petition for rehearing was promptly filed (R. 168) but denied on June 29, 1935 (R. 171). Appellees promptly appealed to this Court, which in an opinion rendered on May 25, 1936 reversed by reason of error committed by the District Court in striking from the petition, at the instance of the Government and the Secretary, allegations that the Secretary himself neither heard nor read the evidence, nor was familiar therewith, but relied for his judgment upon findings made by his subordinates without permitting the market agencies any opportunity to argue with respect thereto. *Morgan v. U. S.*, 298 U. S. 468. Upon a retrial the Court below (Judge Van Valkenburgh dissenting) again dismissed the bill, holding that the appellees had been accorded a full and fair hearing (R. 180, 241). From this decree the appellees promptly appealed (R. 181).

This Court reversed on April 25, 1938 and denied a rehearing on May 31, 1938. *Morgan v. U. S.*, 304 U. S. 1, 23. On June 18, 1938 the District Court set the Secretary's order aside, pursuant to the mandate of this Court (R. 203, 172). Prior thereto appellants had moved to stay the distribution of funds impounded under the restraining order until after further proceedings by the Secretary, and subsequent determination by the Court of the validity of any new order which the Secretary might make (R. 184). On June 18, 1938 the District Court denied the appellants' motion to stay the distribution of the impounded funds and granted the appellees' motion for release of the impounded funds (R. 200) in a *per curiam* opinion (R. 248).

It is from the order of release and it alone that an appeal has been taken to this Court (R., 205). Appellants have not appealed from a denial of their motion to stay distribution.²

²We have recited the course of the proceedings previously had because there is at least a veiled intimation in the brief of the appellants that the appellees are responsible for the delay by reason of which there has been no determination by public authority of the reasonableness of the rates being charged by the agencies at the time of the entry of the Secretary's order on June 14, 1933.

During the entire course of the litigation over his order, the Secretary overlooked no opportunity to interpose technical obstacles to the ascertainment of the truth which eventually came out and resulted in the invalidation of his order. First, he moved to strike the allegations in our petitions, the granting of which motion caused his defeat upon the first appeal (R. in No. 581, Oct. Term, 1937, I, 129). He opposed amendment of our petitions, and was overruled (R. 177). He filed eighteen pages of objections to our interrogatories addressed to himself and moved to strike them although they were clearly authorized by the Federal Equity Rules, and was overruled. He was ordered to answer the interrogatories on December 23, 1936 and did not answer them until March 3, 1937. When, however, he desired to take his own deposition and that of Judge Seth Thomas, the market agencies immediately consented.

On this record, the suggestion that the appellees are responsible for the delays which have resulted from this litigation is wholly without merit.

The suggestion that it is the appellees who have prevented the Secretary from determining at an earlier date what were the reasonable charges to be made by the market agencies for their services is equally without merit. In their original petitions filed within a little more than one month after the entry of the Secretary's order, the order's validity was challenged upon the ground that a full and fair hearing had been denied for the reasons heretofore given (p. 4). As appears from his own evidence on his own direct examination in his own deposition on the retrial, taken by his own counsel, the Secretary knew these facts to be true at the time that the appellees' suits were brought. (R. in No. 581, Oct.

On the first trial in the District Court, a majority of the Court in an opinion by Judge Otis on December 29, 1934 (R. 230) sustained the validity of the Secretary's order, and in so doing adopted the Secretary's Findings of Fact as those of the Court (R. 236). Judge Van Valkenburgh, while concurring in the result because of what he conceived to be the limitations upon the Court's powers in reviewing the Secretary's findings, thought that they would be against the weight of the evidence were the Court free to weigh the evidence (R. 237-239).

On petition for rehearing, Judge Van Valkenburgh, again reviewing the Secretary's findings, stated his own conclusions in the language of Judge Wilkerson in the *Acker* case, as follows:

"I do not concur in the findings of This Court, which adopt in toto the findings of fact made by

Term, 1937, II, 1170-1174.) Instead of thereupon voluntarily setting aside his order and according to the appellees, as was their right, that full and fair hearing which the statute requires, he moved to strike these allegations from the petition.

This Court's decision on the first appeal was handed down on May 25, 1936, two years before entry of final decree setting the Secretary's order aside as the result of the second appeal. This Court at that time advised the Secretary and his counsel as to the essential requirements of a full and fair hearing. Appellees amended their petitions to set the order aside to raise more precisely the questions of fact suggested by the Court's opinion (R. 174). Instead of admitting these allegations of fact, all of which were in substance true, as the Secretary and his counsel must have known at the time, the Secretary again denied them and joined issue (R. 177). If, therefore, there has been any delay in the Secretary's exercise of the powers conferred upon him by the statute, in the manner required both by the statute and by due process of law, the appellees are not responsible for such delay, which may be laid solely at the door of the Secretary himself.

the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill" (R. 241).

Of this the third member of the Court, Judge Reeves, said, "I fully concur in the foregoing Memorandum" (R. 241). The effect was thus to reject as the findings of a majority of the Court those made by the Secretary.

On the second trial the issue chiefly dealt with in the majority opinion of the District Court was that raised for the first time thereon, to wit, the sufficiency of the hearing, which, as heretofore stated, the Court below deemed sufficient, Judge Van Valkenburgh dissenting. In respect of the other issues in the case, the Court speaking through Judge Otis merely said (R. 246):

"We have reached the same conclusions on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference."

The conclusions theretofore announced were those contained in the Court's original opinion, on the first trial, as modified on rehearing, and were:

(1) That one member of the Court (Judge Otis)³ was of the opinion that the order was not only free

³Since prior to this opinion this Court had decided *Acker v. United States*, 298 U. S. 426, which definitely held that a court was not empowered to weigh the evidence in a case like this because no question of confiscation was involved, Judge Otis probably meant only that he thought that the Secretary's findings were supported by substantial evidence.

from attack on the only grounds on which it is open to attack in court, but that the findings were supported by the weight of the evidence and adopted them as his own, but

(2) That the other two members of the court (Judges Van Valkenburgh and Reeves) were of the opinion that essential and important findings going to the intrinsic reasonableness of the rates were against the weight of the evidence, but that since they were supported by some evidence, the Court was powerless to set them aside.

On this state of the record the statement in the Government's brief that the findings embodied in the Secretary's order⁴ had been twice concurred in by the court below is

⁴Although constantly referred to in the Government's brief as the Secretary's findings, they were not his findings but those of the "active prosecutors of the Government", as this Court held on the second appeal.

We have set forth at this length the facts concerning the District Court's opinions because of the constantly reiterated statement in the Government's brief that every available indication points to the unreasonableness of appellees' charges and the reasonableness of the Secretary's invalidated rates, a statement based largely on the supposed concurrence by the Court in such findings. We do not assume that the obligation of the Court or the power of the Secretary to take the action requested by the Government will or may turn upon the presence or absence of any indications as to the reasonableness or unreasonableness of appellees' charges or the Secretary's invalidated rates. If such be the issue, then, for the reasons set forth in the appellees' briefs on prior appeals in this Court (No. 686, Oct. Term, 1935; No. 581, Oct. Term, 1937), and by reason of the facts hereinafter stated, we think that every available indication is that the Secretary's invalidated rates are unreasonably and ruinously low, unjust in the extreme to the market agencies, and that the charges of the market agencies in no wise bore unjustly or unfairly upon the farmers (see Point XI, pp. 142-152, *post*).

not only without support in the record, but would appear to be directly contrary thereto.

The appellants' motion to stay the distribution of the impounded moneys did not allege that the appellees at any time during the impounding period collected any unreasonable charges from the shippers or that the charges collected from the shippers, including the amounts impounded, were unreasonable or unjust.⁵ Their motion was

⁵Appellees had filed their verified reply to this motion on June 11, 1938, praying an order denying and overruling defendants' motion (R. 188-194). They alleged that the funds in the Registry of the Court were the sole property of the appellees and that no undetermined issue in this case was before the Court. (*Illinois Bell Telephone case*, C. C. A. 7th, decided Feb. 22, 1939, and unreported.) It set forth that the charges collected during the period of impounding were lower than the maximum rates prescribed as reasonable by a prior valid order of the Secretary of Agriculture made upon complaint and after full hearing; that in no subsequent proceeding had the Secretary of Agriculture, after full hearing, by valid order, determined that these rates and charges were unreasonable, and that as actually collected by plaintiffs the said rates were the legal rates which plaintiffs under the Act were required to and did collect. The reply also alleged that a majority of the statutory court in an opinion rendered on the twentieth day of June, 1935, had found that the Secretary had departed from the methods employed in previous like cases in connection with the making of the purported order; that the drastic reduction in advertising and other costs made by the purported order gave "scant consideration to the reasonable necessities of the situation" and that "the effect of the methods employed might, as suggested by the petitioners, tend to weaken and to ultimately destroy the market by diverting business to more favored markets and agencies" and might tend "further to the undue restriction of agencies enabled to operate profitably with the result injurious not only to the Kansas City live stock market, but equally to the shippers of stock conveniently patronizing it".

It was further alleged that a large number of petitioners had already been compelled to discontinue business by reason

based wholly upon the allegation that the Secretary had reopened the proceedings before him, and that "after full hearing the Secretary will determine by an order as of June 14, 1933, what rates may be reasonably charged by petitioners to their clients for the services rendered them" (R. 185), and prayed that the funds be retained in the possession of the Court until the Secretary should have entered such an order and "such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction" (R. 186).

In its opinion denying the appellants' motion and granting that of the appellees, the District Court held, and we think without question properly (1) that in view of the purpose and terms of the restraining order the appellees were entitled as of right to have the impounded funds released; (2) that the Secretary was without authority to enter a *nunc pro tunc* order fixing rates as of June 14, 1933, the only ground upon which distribution of the funds was sought to be stayed (R. 248).

THE STATUTES INVOLVED

The powers of the Secretary of Agriculture are both defined and limited by Title III of the Packers and Stock

of the impoundings required during the period of the pendency of this case and prior to the adjudication of said order as invalid, and others of petitioners continuing in business had suffered financially by reason of such situation to an extent which might, unless said funds were immediately restored to them, impair their ability to render efficient service in connection with the sale and purchase of live stock as required by the Packers and Stock Yards Act.

No reply to this verified pleading of the appellees was filed by the appellants, and the facts alleged therein stand admitted for the purposes of this appeal.

Yards Act, 1921 (42 Stat. 159, 7 U. S. C. c. 9, sections 181-229). The jurisdiction of the District Court is defined by Section 316 of said Act, which makes the provisions of the Urgent Deficiencies Act (38 Stat. 220, Title 28 U. S. C., Sections 44, 47 and 47a) applicable to cases brought to set aside orders made under the Packers and Stock Yards Act. The Urgent Deficiencies Act and Title 28, Section 382 of the United States Code (38 Stat. 738) set forth the circumstances under which a temporary restraining order or temporary injunction may be issued and the terms upon which it shall be conditioned. Section 47a of the Urgent Deficiencies Act contains the applicable provisions governing the appellate jurisdiction of this Court.

The pertinent provisions of these several statutes are set forth in full in the Appendix.

SUMMARY OF ARGUMENT

I

The moneys impounded in the court below were impounded for the specific purpose of providing security to the shippers in the event the Secretary's order should be held invalid by this Court. This is shown not only by the terms of the temporary restraining orders, as a condition of the issuance of which the impounding was ordered, but by the circumstances under which they were entered, the explicit declaration of the statutory court as to its purpose in requiring the condition, and the express terms of the statute (Title 28 U. S. Code, § 382) governing the giving of security in connection with the obtaining of restraining orders and injunctions, which statute provides

that security shall be given for damages caused by the erroneous or improvident issue of the restraint.

The Secretary's order having been held invalid by this Court, and the court below having entered its final decree permanently enjoining the enforcement of that order, its action in determining to release the impounded funds to appellees should be affirmed. There is no warrant for reading into the temporary restraining orders a condition not intended to be imposed by the Court and which, in fact, it would have had no power to impose, in order to retain the impounded funds for an indefinite period pending the making of a new rate order by the Secretary to take effect *nunc pro tunc* as of June 14, 1933. The "causes", pending the disposition of which the moneys were required to be impounded, were the causes in court brought to set aside the Secretary's order as invalid, and this expression cannot be construed to include a subsequent quasi-legislative proceeding before the Secretary of Agriculture which may or may not result in new causes in court. The administrative proceeding and the proceedings in court, now concluded, are independent of each other and the relationship between such proceedings is not analogous to the relationship between proceedings in a lower court and in an appellate court (Point I, pp. 23-35).

II

When the statutory court, pursuant to the mandate of this Court, set aside the Secretary's rate-fixing order and permanently enjoined it, there remained no "case" or "controversy" or justiciable issue in the court below. There was, therefore, no proceeding capable of judicial cogni-

zance in which the stay of the distribution of the impounded funds requested by the Government could issue. The only possible justiciable issue suggested by appellants has to do with the reasonableness of the charges collected by the market agencies during the impounding period. This, however, is an issue which under the Urgent Deficiencies Act could not have been raised in the proceeding to set aside the Secretary's order and was not raised. It cannot, therefore, be imported into the case at its conclusion. It is, moreover, a legislative question, being a matter of discretion and not of law, and is not appropriate for determination by the Court. Appellants confuse this case with a restitution case arising from the improvident action or failure to act of a court. No such situation obtains here. Since no other "case" or "controversy" has been suggested, the order of the statutory court should be affirmed. Even, however, were it otherwise with respect to the existence of a "case" or "controversy", the motion of appellants did not present to the statutory court any justiciable issue in that no allegation was made that the market agencies ever charged any unreasonable rates (Point II, pp. 36-42).

III

Nothing that the Secretary can do in his reopened quasi-legislative proceedings brought on his own motion can in any way affect the disposition of the impounded funds by the Court, since the Secretary has no power under the statute to make a *nunc pro tunc*, pre-dated or retroactive order. The statute expressly confines him in such a proceeding to the making of rates "to be thereafter observed", which can only be done "after full hearing" (Sec. 310). Damages

may be awarded to a shipper on account of unreasonable charges made to him in the past only upon express complaint from the shipper filed within 90 days after his cause of action arose (Secs. 308 and 309). No order for the payment of money may be made upon the Secretary's own motion (Sec. 309c). Even a court cannot make a *nunc pro tunc* order except when the order could properly have been made at the time to which it is related back. The sole legitimate purpose of such an order is to correct the record so as to make it speak the truth as to the order which was actually made. The power is to be exercised to correct clerical, not judicial, errors. The Secretary's power is even more limited because it is expressly controlled by the terms of the statute previously referred to. On the Secretary's own theory he was, on June 14, 1933, in the middle of a hearing. No order can be made now to be dated as of a time five years ago, when the administrative proceeding was concededly incomplete. The Secretary can make no order now which he could not have made then. The findings contained in the order of June 14, 1933, were made by the "active prosecutors for the Government" and the market agencies, as this Court has held, were given no opportunity to argue in refutation thereof (304 U. S. 1, 23). It is wholly untenable to suggest that, by a readoption of these findings after hearing at this time, the Secretary may date them back to the date of the old order before hearing. Contrary to the claim made by appellants, the Secretary's order will be retroactive and intended to be. This retroactive effect cannot be escaped from by attempting to identify the Secretary's order with that of the Court, which, it is argued, must be compelled to adopt it. There is no analogy between

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the order which the Secretary proposes to make and legislation of limited retroactive effect or in ratification of the technically defective acts of the executive. Congress or a state legislature may act without hearing at all because, in theory at least, representative of the will of the people. The Secretary is the mere delegate of Congress and can validly act only in strict accordance with the statute which prescribes a "full hearing". His acts are a nullity unless he complies with all conditions precedent (Point III, pp. 2-54).

IV

Any power which the Secretary may have ever had to determine the reasonableness of the appellees' charges, a matter put in issue by the proceeding in which his invalid order of June 14, 1933, was made, is now exhausted. This is so because on October 14, 1937, while the litigation over the validity of his order of June 14, 1933 was still going on, the Secretary reopened the administrative proceeding and authorized the market agencies to file new and higher rates to become effective as of November 1, 1937. The question, therefore, as to whether the rates of appellees under investigation were reasonable has become moot. In the reopened proceedings before the Secretary, the only power which he could exercise would be to establish by order the charges "to be thereafter observed". Such an order may be entered only if the Secretary "is of the opinion that any rate, * * * of a * * * market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, * * *" (Section 310). Were the Secretary proposing, as he is not,

to make rates for the future, he would thus be compelled to determine whether the rates which became effective November 1, 1937, and are now in effect, are or will be, in the future, unreasonable. No issue as to the reasonableness of the rates which they superseded would be involved. Nothing that he can do in this proceeding can, therefore, in any way affect the impounded funds (Point IV, pp. 55-58).

V

1. The Government's contention that the Court should mold the statute to effectuate the so-called substantive provisions of the statute by permitting the employment of an extraordinary remedy not provided for therein is without support in the statute itself, contrary to the legislative policy of Congress as embodied in the Act and repugnant to settled principles of administrative and constitutional law. It is plain that the remedies provided in the statute are exclusive. The charge of unreasonable rates in the past must be specifically complained against within the statutory time and the Secretary cannot, upon his own motion, award reparation. Such power has been expressly withheld. Nor can he accomplish the same result by a *tunc pro tunc* order in a quasi-legislative proceeding, for the statute expressly prohibits his so acting.

The prior decisions of this Court in this case constitute a complete answer to the distinction attempted to be made between the effect of substantive and so-called "procedural" errors. As this Court said, the refusal of the Secretary to grant a full and fair hearing was a "vital

defect" and "more than an irregularity in practice" (304 U. S. 1). To permit the Secretary to now cure this "vital defect" by a *nunc pro tunc* order not only would be to override the express statutory limitations upon the exercise of the Secretary's powers but would be repugnant to fundamental requirements which go "to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1). If denial of such rights may be corrected by *nunc pro tunc* orders, a high premium is put upon snap judgment and the right of respondents to fair and impartial determination by an officer or tribunal approaching the case with an open mind is effectively destroyed. It would, in fact, as a practical matter, prevent any effective contest of administrative orders because such orders could always be corrected *nunc pro tunc* no matter how many proceedings might be necessary for the purpose.

Not alone could correction be made of so-called procedural errors but also of any other. The result would be a denial to respondents of their most important substantive right, not to be deprived of their property or liberty of action, or both, without warrant of law.

2. The provisions of Section 305 of the Packers and Stock Yards Act are not self-executing. The sections dismissed by the Government as merely procedural are as much a part of the legislative scheme as is the requirement of just and reasonable rates. It would be wholly repugnant to the constitutional doctrine of separation of powers as between the legislative, executive and judicial departments of the Government for this Court to evolve additional and

substitute "procedural mechanisms" to implement further the substantive requirements of the Act. The charges in schedules required to be filed by the market agencies pursuant to Section 306 of the Act must be collected under pain of civil and criminal penalties until duly and legally displaced by order of the Secretary. The provision for just and reasonable rates in the statute means just and reasonable rates to the market agencies as well as to the shippers. Examination of the Act as a whole demonstrates clearly that by the enactment of Section 305 Congress did not intend to confer substantive rights either upon the shippers or upon the market agencies to be enforced and made effective at every moment of time—whether before or during the pendency of proceedings before the Secretary or in court—but only in the manner and subject to the limitations imposed by the so-called procedural sections of the Act, by which alone the substantive requirements would be effective.

3. The Government's complete misconception of the legislative policy of Congress end of the relationship between the substantive and so-called procedural provisions of the Act is further demonstrated by a consideration of the Interstate Commerce Act and its legislative and judicial history over a period of more than fifty years, upon which Act the Packers and Stock Yards Act was modelled. The legislative history of the amendments to the Interstate Commerce Act makes it unmistakably plain that in respect of that Act it was, from the beginning, the purpose of Congress that its substantive requirements should be effectuated only by the means prescribed and subject to the limitations imposed by its procedural provisions, and in no other

manner. The history of these amendments discloses that in adopting them Congress recognized that procedural deficiencies could be cured only by statute, and that where such deficiencies existed, its substantive provisions could be effectuated only by altering the "procedural mechanism" by statutory enactment.

4. The failure of the Interstate Commerce Commission to recommend or of the Congress to provide for any such supplementary remedy as now proposed during the fifty years of experience with the Interstate Commerce Act from which the Packers and Stock Yards Act was copied, is persuasive, if not conclusive, that none such was intended (Point V, pp. 59-99).

VI

The analogy to court proceedings, far from supporting the Government's contentions, supports those of the appellees. There is, properly speaking, no "cause of action" in a quasi-legislative proceeding as there is in a proceeding in court. Upon judicial review of a quasi-legislative order, the reviewing court does not order a new trial or give directions to an administrative tribunal. That tribunal is free to act as it pleases, subject to having its orders set aside in the courts if not in compliance with law. When a new trial is ordered in court the judgment is entered as of the date of its rendition—not as of the date of the judgment previously set aside. But this kind of a judgment or order—the only kind a court may enter—advances the Government nowhere. The power of a law or equity court to award damages for the past inheres in its exercise of the judicial power. The Secretary, however, can award

damages for the past only in accordance with the statute which prohibits his doing so upon his own motion (Point VI, pp. 100-104).

VII

The authorities cited by appellants do not support their position (Point VII, pp. 104-116).

VIII

The Court had no power to condition its temporary restraining orders in such a way as to fix reasonable rates during the impounding period. Not having done so, it follows *a fortiori* that it cannot be compelled to now fix them retroactively (Point VIII, pp. 116-123).

IX

The Court and the Secretary acting in cooperation cannot, by attempted joint action, exercise powers not possessed by either. The statutory court has no supervisory or appellate administrative jurisdiction. Litigation begins where legislation ends, and courts and administrative agencies of the Government are thus compelled by the action of Congress, if not by the Constitution, "to regard each other as things apart". Each must recognize the rights of the other in its own sphere, but neither may act within the sphere of the other, delegate to the other any part of its own power, confer upon the other any power not conferred upon it by Congress, or, in cooperation with each other, exercise powers not conferred upon either. Any order which the Secretary may make in the reopened proceedings

before him will be quasi-legislative and not quasi-judicial in character.

Such an order cannot be *res judicata*, and can, therefore, have no binding effect in determining whether or not appellees' rates in the past were reasonable. The fundamental requirements of administrative procedure are simple and easily understood. There is no danger that the "far fetched demands of ingenious counsel" and the timidity of administrative agencies in dealing with them will interfere with the orderly course of administrative proceedings.

If, however, administrative tribunals may commit fundamental errors with impunity and correct them backwards, it is idle to suggest that even-handed justice will have been accorded to respondents before them. The fundamental requirements of a full and fair hearing must be met when they first are required to be met, and when the mind of the administrative officer or tribunal is open, if their essentials are to be preserved.

Neither the Court nor the Secretary, acting jointly with the other, may exercise power which neither acting alone could exercise. Nor may they, acting in cooperation, exercise the legislative power of adding to or supplementing the provisions of the Act itself, especially in a manner directly contrary to the limitations contained in such provisions (Point IX, pp. 123-128).

X

If the molding of the statute requested by appellants should be indulged in by this Court it is clear that the market agencies would be deprived of essential rights guar-

anted to them by the Constitution and the statute, while extra-statutory rights and privileges would be conferred upon the shippers. All of this, although to be done in the name of equity, would only succeed in producing a most inequitable result. The Government's theory would deny the market agencies an impartial trier of the facts, part of the inexorable safeguard of due process of law, since it would permit the Secretary to pass upon the question of whether or not and to what extent the appellees have been prejudiced by his refusal to accord them their fundamental rights. The Government's theory would also confer upon the Secretary the power, by a "snap order" and the subsequent validation thereof *nunc pro tunc*, to deprive market agencies of their rights to judicial proceedings before impartial judges and juries in actions for reparation.

The molding of the statute requested by appellants would provide for the shippers an attachment to which they are not entitled and without their giving any security therefor. It would be grossly inequitable for the Court to distribute the impounded funds in accordance with an order of the Secretary made *nunc pro tunc* as of June 14, 1933. The acceptance of appellants' contentions would result in a dangerous extension of the Secretary's already great power to fix maximum wages (Point X, pp. 128-141).

XI

Every available indication is that appellees' rates were reasonable, and no miscarriage of justice suggests or requires the improvisation of an extra-statutory remedy (Point XI, pp. 142-152).

ARGUMENT**I**

UPON THE ENTRY OF THE FINAL DECREE SETTING THE ORDER OF THE SECRETARY ASIDE, THE APPELLEES BECAME ENTITLED, UNDER THE TERMS OF THE RESTRAINING ORDERS AND IN VIEW OF THE PURPOSE FOR WHICH ENTERED, TO HAVE THE IMPOUNDED FUNDS RELEASED.

If, by reason of the purpose of the restraining orders as shown by their terms and the circumstances under which they were issued, the appellees are now entitled to have the impounded funds released because the purpose for which they were impounded has been fully satisfied, then the order directing their release should be affirmed, whether the District Court might have required the funds in question to have been impounded for some other or different purpose or not.

We think it admits of no doubt, as held by the Court below, that the funds were impounded as security for damages, as required by Title 28, Section 382 of the United States Code, in the event it should turn out that the restraining orders had been improvidently or erroneously issued, and for no other purpose. There is, we think, no warrant for reading into the impounding orders a further and unexpressed condition that the funds should be held not only to abide determination of the validity of the Secretary's order—which alone was the subject matter of the causes in which they were entered—but to abide as well the determination of the validity of some subsequent order which the Secretary might or might not make if the challenged order

should be set aside. So to have conditioned a restraining order or temporary injunction would, to say the least, have been extraordinary and unusual, if not, as we think, beyond the authority of the Court. Had such been the purpose, it should and doubtless would have been clearly expressed. The Court below, whose orders they were, not only said that such was not its purpose, but that now to import into its orders such an unexpressed condition would be an act of bad faith upon the part of the Court itself (R. 249).⁶

Moreover, were the orders ambiguous—which we think they clearly are not—it is respectfully submitted that this Court should accept the statement of the Court below as to its intent, unless clearly at variance with the language of the

⁶In this connection the Court said:

"We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

"If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined."

orders themselves, since that Court alone is capable of stating what its intent and purpose were. Court orders and decrees, like contracts, should be construed so as to give effect to the intent of those by whom made, unless violence is done to their express terms by so doing. It may be said, as was suggested from the bench at the previous argument, that this Court is as capable of construing the orders as is the Court below. But this statement we think is necessarily subject to some qualification. If the District Court's interpretation of its own orders were clearly repugnant to their express terms, it would be entitled to little or no weight. But it clearly is not. On the contrary, the Government points to no provision in the orders themselves which lends any substantial support to its position. It would have this Court read into the orders of the District Court a condition which is not only not contained therein, but which that Court has said it did not intend to impose. This, it is respectfully submitted, this Court should not do, except for the most cogent reasons drawn from the terms of the orders themselves, the circumstances under which entered, or the statutory requirements governing and limiting the issuance of temporary restraining orders by the District Courts. No such reasons exist. On the contrary, when these factors are considered, either separately or together, it is, we think, plain that the Court below was right in directing that the impounded funds be released.

The Urgent Deficiencies Act provides that no temporary restraining order or injunction shall issue except upon a finding of irreparable injury (28 U. S. C. § 47). As set forth in the statement a separate suit was brought by each of the market agencies and a restraining order, identical in terms, was entered in each. The orders in question contain

such a finding, for which there was ample support (R. 129). It is not and cannot be contended that the orders were improvidently issued or improvidently continued in effect during the litigation. Since the Secretary's order has now been held to be invalid, it cannot be asserted that it was wrongfully restrained *pendente lite*. Under the Packers and Stock Yards Act the charges of the market agencies named in their tariffs on file with the Secretary are required to be collected by them and paid by the shippers [Section 306 (f)] until displaced by others similarly filed [Section 306 (c)], or by a valid order of the Secretary prescribing rates for the future only, which may be made only "after full hearing" [Section 310]. Had the Secretary's order been permitted to become effective *pendente lite*, but set aside on final hearing, the market agencies would have suffered irreparable injury. On the other hand, if stayed *pendente lite* but sustained on final hearing, the shippers would have suffered damage by reason of its wrongful restraint.

The Urgent Deficiencies Act does not condition the granting of a temporary restraining order or injunction upon the giving of security. But Title 28, Section 382 of the United States Code, which is of general application, provides:

"§. 382. *Same; security on issuance of.* Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. (Oct. 15, 1914, c. 323, § 18, 38 Stat. 738.)"

This statute does not provide in what form security shall be given. Under well settled and accepted practice, security, where required, may be posted either by the giving of a bond or by the deposit of cash. In this case the Court provided for the latter by requiring the excess over the Secretary's rates to be impounded as collected "pending final disposition of this cause". It is plain that the restraining orders were framed to meet the statutory requirements, which are (1) a finding of irreparable injury; and (2) the giving of security for the benefit of those persons who might suffer damage by reason of the wrongful restraint of the Secretary's order. There is nothing in the restraining orders from which any other or further purpose may be inferred. On the contrary, it would appear from a fair reading of the orders themselves, as well as the circumstances under which entered, that such was their only purpose.⁷

After appropriate recitals of notice, etc., the Court by its orders finds "immediate and irreparable injury and damage will result to petitioner unless such Order (the restraining order) shall issue" (R. 129). In support of this general finding the Court further specifically found that unless the Secretary's order were stayed, the Secretary and others would

"proceed in derogation of the right of the petitioner to collect rates and charges for stock yard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said order, the petitioner would be unable to collect from the users of its service the differences be-

⁷Indeed the Government itself has so construed them. See page 4, *ante*.

tween the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. *In the event the relief in said petition prayed was finally granted by this Court*, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States" (R. 129).

By these recitals the Court clearly contemplated that if the relief prayed should be "finally granted" by the Court, each petitioner would be entitled to the collections accruing under the charges then on file, which during the pendency of the restraining order would be the only legal charges under the Packers and Stock Yards Act. The only relief "prayed" in "the petition" or which could be "finally granted" thereon was to set the order aside as invalid.

The Court accordingly temporarily restrained the defendants and all others from interfering with, abridging or performing any act in any wise militating against the right of each petitioner to

"collect, demand, *receive, and retain* rates and charges for stock yard services at the Kansas City Stock Yards in accordance with the Schedule of Rates and Charges of petitioner now on file with the Secretary of Agriculture" (R. 130).

Mindful, however, of the requirements of Title 28, Section 382 of the United States Code, the restraining orders were conditioned (R. 130) as follows:

"Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending *final disposition of this cause*, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

Manifestly, this part of the orders, by which funds were required to be impounded, was inserted for the purpose of providing the security required by the Code to cover the damages which the shippers might suffer, if it should turn out upon the final disposition of the cause that the Secretary's order had been wrongfully restrained *pendente lite* because valid and enforceable. The orders contain no language from which any other or further purpose may be reasonably inferred.

It is said that the orders do not expressly provide for a release of the impounded monies to the market agencies by whom deposited, if they should prevail on final hearing. Neither do they provide that such monies be paid back to the persons from whom collected by such market agencies in the event of a dismissal on final hearing. What the orders do provide is that the funds shall be impounded "pending final disposition of this cause". Giving to these words the meaning in which they are customarily employed in court orders, pleadings, etc., it is plain that each order has reference to final disposition of the cause in the Court in which the order itself was entitled, *e.g.*, *Morgan v.*

United States, as in other cases where the expression "this cause" is used. To give it the interpretation insisted upon by the Government would be to give to it a meaning wholly inconsistent with the relative positions occupied and functions performed by a court, on the one hand, exercising the judicial power, and an administrative officer, on the other hand, proposing to exercise delegated legislative functions.

(That the Court used the words "this cause" in their ordinary sense is further supported by the fact that, while afterwards consolidated for trial, each market agency instituted in court a separate suit or cause of its own to set the order aside (R. 170). Since confiscation was charged by each, no omnibus bill could have been brought in behalf of all. There were thus pending in the Court not one cause but fifty-one separate causes, in each of which identical restraining orders were issued. These separate causes were *afterwards* consolidated and heard together for the purposes of trial, but each retained its own identity, a separate decree was entered in each, and separate appeals taken. True, they related to a single subject matter, but by the expression "this cause" the Court clearly referred in each case to the separate cause in which entered and not to the omnibus proceeding before the Secretary out of which each grew, to which all of the petitioners had been parties, which had terminated with the entry of the Secretary's order and over whose further course, if the order should be set aside, the Court had not and could not have any control.

This Court has held the Secretary's order invalid. Pursuant to this Court's mandate, it has now been set aside by a final decree of the District Court entered in each of the causes in which the Court had theretofore entered its order

for the impounding of the funds in question "pending final disposition of this cause". While the order was invalid, it was not subject to collateral attack, but only in a suit brought to set it aside in the manner provided in the Urgent Deficiencies Act. Such suits were brought. Up to that time there had been no cause pending in the District Court, and no judicial proceeding of any description whatever. There had been a quasi-legislative proceeding pending before the Secretary. That proceeding had been terminated by the entry of the Secretary's order. That order was the subject matter and the only subject matter of the several separate causes instituted by appellees in the District Court. In each of those causes the sole issue raised or which could be raised was the validity or invalidity of the Secretary's order. The reasonableness of the rates charged or to be charged, aside from the allegation of confiscatory effect, was not put in issue, and could not have been put in issue by the appellees' petitions to set the Secretary's order aside. That was a legislative question for the Secretary to decide. (See cases cited Point VIII, pp. 116-123, *post*.) Each of these "causes" in the District Court was instituted by the filing of an appellee's petition, and would terminate with the entry of a final decree.

Neither the pendency of the "cause" in the District Court nor its termination by final decree had or could have any effect upon the Secretary's continued control of the administrative proceeding before him, in which his order was made. He could, of his own motion, reopen it and make a new order at any time he chose, either before or after final decree. In 1937, when the causes in court were pending, he actually did reopen the administrative proceeding before him and entered a new order to be effective from

and after its date (R. 193). He has now undertaken to reopen it again. The Court is without power either to require or to prevent him from doing so or to give him any directions in respect thereof. He is an arm of Congress.

The attempted analogy to appeals in judicial proceedings breaks down at every point. When a "cause" in court is appealed, the lower court loses jurisdiction. It may not during the pendency of the appeal set aside or modify its judgment, or grant a new trial. In the exercise of its appellate jurisdiction the appellate court may reverse outright, modify the judgment below, remand with directions to grant a new trial, and otherwise direct and control the further action of the lower court. If judgment was for the plaintiff, the appellate court may reverse with directions to dismiss, thus putting an end to the case both above and below, or remand for a new trial. This is because there is but a single cause, and the several courts through which it may pass are but component parts of the same department of the Government having jurisdiction over that cause—the judicial.

But in a "cause" brought to set aside a legislative order of an administrative tribunal, the Court may not order the latter to dismiss the proceeding in which it was made, to reopen it, or in any other manner direct its further conduct. If it holds the order invalid, it does not direct its vacation by the tribunal which entered it, as in the case of an appeal from a lower court, but itself enters a decree setting it aside and enjoining its enforcement. Its orders act upon the administrative order *in rem* and upon the administrative tribunal *in personam*, not as directions to an inferior tribunal.

After an order has been set aside, the administrative tribunal is free to reopen the proceeding or not, as it chooses, and to enter a new order, subject only to the right of any party aggrieved by such new order to institute a new suit to set it aside. Such a suit, when brought, is not a part of the old cause in which the former order was set aside, but a new one. In such event, not only the cause but the subject matter is different, viz., the new order, although the subject matter of the administrative proceeding may be the same. These observations apply with especial force to the relation between Federal courts and Federal administrative tribunals because of the separation of judicial and legislative functions provided for in the Federal Constitution. *Keller v. Potomac Electric Co.*, 261 U. S. 428. The cause in Court and the administrative proceeding before the Secretary were and are thus wholly independent of each other, although it was the Secretary's action in the latter which brought into being a cause of action by reason of whose existence the jurisdiction of the Court was invoked, as may the acts of any other person, public or private, natural or artificial.

Whatever bearing, if any, the attempted analogy to appellate procedure in judicial proceedings may have upon the Government's argument that the District Court had the power to make an order requiring the funds in question to be impounded, not only pending the cause, but also pending subsequent action which the Secretary might or might not take, and the determination of its validity in another or new cause, should it be attacked, it lends no support to the contention that the Court *did* make such an order. It admits of no doubt that when the Court ordered that the monies be impounded "pending final disposition of this

cause"; it used the words in the sense in which they are customarily employed in interlocutory orders, meaning thereby the cause pending in the court in which the order was entered. For the reasons stated above, we think the words "pending final disposition of this cause" are susceptible of no other interpretation. Certain it is that if it was the purpose of the Court, *as it says it was not*, to provide that the monies be impounded to await some further and subsequent determination by both the Secretary and the Court, the words employed were wholly inept for the purpose. There is therefore no warrant for reading into the orders an unexpressed condition, which is neither contained therein, nor within the intent of the Court which entered the orders, as evidenced by the opinion below (R. 248).

Such a conclusion is made inevitable by five separate and distinct considerations. The first is that the only security required by Section 382, of Title 28, U. S. Code, which governs security in connection with the obtaining of injunctions, is security against damages due to the issuance of an improvident injunction. The second is that if the Government's contentions should be accepted, it would, as a practical matter, be impossible to make the requisite showing of irreparable injury required by the Urgent Deficiencies Act.² The third is that the terms of the temporary re-

²This is so because it would be necessary for the petitioner in such a case not only to show that it would be injured by the enforcement of the challenged order if permitted to become effective, *pendente lite*, although invalid, but also to show that, if set aside, the administrative officer or tribunal which entered it could never thereafter, by a new and valid order, re-establish the rates prescribed by the order under attack.

straining orders are in conflict with the Government's contentions. The fourth is that the statutory court has in no uncertain words declared that it was not its intention to do what the Government claims. The fifth is discussed in Point VIII, pp. 116-123 *post*, and is lack of power in the Court to so condition its restraining orders as to itself enter the rate-fixing field.

The order of the Court below should therefore be affirmed, since it is the only order the Court could properly make under the terms and in view of the purpose of the orders by which the funds now in the custody of the Court were impounded. The propriety of the order below is, of course, in no wise affected because in disposing of funds in accordance therewith, the Court may be compelled to determine the rights of various claimants thereto, such as assignees, creditors, etc. These are persons claiming under the market agencies and not against them. Clearly if, by reason of assignments, insolvency, etc., one of the agencies by whom the funds were deposited is no longer their owner, the true owner may make a claim thereto. Exercise by the Court below of jurisdiction to determine questions such as these, however, lends no support to the argument that the Court could now, as it refused to do, retain the funds after the causes have been finally determined, to await some further determination by the Secretary and Court by reason of some proceedings which may be subsequently taken, and which, when taken, may give rise to some further cause in Court.

II

NO CASE OR CONTROVERSY OR JUSTICIABLE ISSUE EXISTED IN THE COURT BELOW. IT THEREFORE WAS NECESSARY FOR IT TO RELEASE THE IMPOUNDED FUNDS AS IT DID.

No "case" or "controversy" involving the reasonableness of appellees' rates, (as distinguished from their confiscatory character) now is or has ever been before the statutory court.⁹ Appellees' suits under the Urgent Deficiencies Act were brought for only one purpose and could have been brought for no other. This was to determine the validity of the Secretary's rate-fixing order and if invalid to have it set aside. They were not brought to determine the reasonableness of appellees' charges as contained in the tariffs filed by them with the Secretary of Agriculture. That could only be done by the Secretary "after full hearing", and is a legislative question. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 307; and cases cited Point VIII, pp. 116-123, *post*. What appellants now seek to do is to import into this case a non-judicial issue which has never been in it and could not have been litigated in it. The sole function of the statutory court is to pass upon the validity *vel non* of the quasi-legislative order made by the Secretary. As Mr. Justice Holmes in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134, at p. 138, speaking for this Court, said about a State statute authorizing the review of administrative orders, "the remedy in

⁹"The term 'controversies', if distinguishable at all from 'cases', is so in that it is less comprehensive than the latter. * * * " *Muskat v. U. S.*, 219 U. S. 346, 356.

any event is purely judicial: to exonerate the appellant from an order that exceeds the law".

The only justiciable issue that was ever in this case, to wit, the validity or invalidity of the Secretary's order, has been conclusively determined by this Court. Appellants' idea that some "case" or "controversy" or justiciable issue remains for the decision of the statutory court doubtless arises out of the confusion of this case with cases in which errors of the lower court in granting or refusing relief have given rise to a right to sue for restitution. Such cases are *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781; *ex parte Lincoln Gas Co.*, 256 U. S. 512; and *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134. In our case, however, there never was or could have been any necessity, under any circumstances, for any restitution proceeding ancillary to the main case, because of the fact that the security given in the form of the impounding of funds was given for the express purpose of obviating the necessity of bringing any restitution proceeding in case the temporary restraining order should prove to be improvident and the market agencies should refuse to refund. The statutory requirement for security where a temporary restraining order or other injunction is issued is clearly based upon the doctrine invoked in *Atlantic Coast Line v. Florida*, 295 U. S. 301, in which the court said, at page 309:

"what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error (citing cases). Indeed, the concept of compulsion has been extended

to cases where the error of the decree was one of inaction rather than action, as where the court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy."

In our case the issuance of the temporary restraining order which suspended the Secretary's rates would have been improvident if the Secretary's order had been held valid. But that improvidence would have been secured against by the impounding, thus obviating the necessity of a restitution suit ancillary to the main proceeding if the market agencies should refuse to refund. Since the Secretary's order was held invalid, that is the end of the matter and no "case" or "controversy" remains.¹⁰ The right to possession of the impounded funds automatically vests in the market agencies. Not even an order of the court was necessary for the release thereof, much less an ancillary or independent suit against the Secretary or the shippers. The only function of the order actually made to release the impounded funds was to provide the Clerk with formal authority to release them.

It is plain from the above that there is no "case" or "controversy" in the statutory court between appellees and appellants. The most that can be said is that since the Secretary has attempted to reopen the proceedings before him there may some day be a "case" or "controversy" between him and some or all of the market agencies. In Point we have clearly demonstrated that the quasi-legislative proceedings before the Secretary are entirely independent of the judicial proceedings in court and therefore afford no

¹⁰*Cf. B. & O. R. R. v. I. C. C.*, 215 U. S. 216, 223.

foundation for any argument that there is a "case" or "controversy" in court because the administrative proceedings have been reopened. It is elementary law that a court cannot issue a stay or restraining order except in a "case" or "controversy" legally pending before it. There is no such "case" or "controversy" now pending. There may, indeed, never be any such "case" or "controversy" even in the future because in the reopened proceedings the Secretary may, and indeed clearly should, if he really considers the matter, find that the charges of appellees in force when he issued the order of June 14, 1933 were just and reasonable, or that they are too low and that higher maximums should be set. The market agencies would contest neither of these findings. Thus it is only the mere speculative possibility of there being at some time in the future a "case" or "controversy" upon which the appellants' argument rests.

There was, moreover, no justiciable issue before the statutory court for its determination. We have shown that the case before the statutory court never involved any issue of the reasonableness of the rates being charged by the market agencies¹¹ and that no such issue could be imported into it by motion after this Court had decided the controversy. But assuming the contrary, no such issue was ever presented to the statutory court for its determination, for neither the Secretary nor any shipper alleged to that court, prior to the time it released the impounded funds, that the appellees had ever charged any unreasonable rates.

¹¹The market agencies thought at the time that it was open to them to attack the rates in the Secretary's purported order as confiscatory. This Court held to the contrary in *Acker v. U. S.*, 298 U. S. 426.

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In the *Atlantic Coast Line* case, *supra*, the shippers themselves in their petitions to the court for restitution directly alleged that the rates collected by the railroad were unlawful and unreasonable. The carrier answered the petition, objecting to the jurisdiction of the court and asserting that the Cummer Scale was unreasonable and confiscatory and that the rates collected by it were lawful and reasonable. Thus there was presented to the court a justiciable issue raised by proper pleadings.

Here no such issue whatsoever has been raised even by the Secretary, much less by the shippers.

Without attempting to point out what "case" or "controversy" or justiciable issue there was in the statutory court, appellants merely rely, as we have said, upon such cases as *ex parte Lincoln Gas Co.*, 256 U. S. 512; *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134; *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781; and *Atlantic Coast Line v. Florida*, 295 U. S. 301. In each of these cases, unlike this case, there was a "case" or "controversy" and a justiciable issue before the lower court, for each of these cases involved a suit for restitution.

In such cases as *ex parte Lincoln Gas Co.*, 256 U. S. 512, and *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, the statutory court granted injunctions against the enforcement of rate orders, conditioned upon the posting of bonds to repay customers. This Court held that the rate orders were valid and hence that restitution proceedings were properly conducted by the statutory court. In *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781, the statutory court had erroneously refused to set aside an order of the I. C. C. requiring the railroads east of the

Mississippi River to absorb transfer charges across the river on westbound traffic. This Court held, after reversing the decree below, that the east side roads were entitled to restitution in the statutory court.

In the *Atlantic Coast Line* case, 295 U. S. 301, excess tonies¹² had been collected by the railroad pursuant to an order of the I. C. C. which the District Court should have set aside because not supported by proper findings. This Court, therefore, held that the District Court had jurisdiction of a suit for restitution, although it further held that no restitution should have been granted. The theory on which such a restitution suit had to be based was improvident action or inaction of the Court.

In our case no ground for any restitution suit exists. There never has been an order, judgment or decree in this case, having any connection with the impounding of the tonies, which was erroneously entered against the rate-payers and of which the appellees were the beneficiaries. The Secretary's order of June 14, 1933, was erroneous and the several decrees of the statutory court refusing appellees relief against that order were each and all erroneous, but in every case the error was in favor of the appellants, not against them. There is thus no possible excuse or occasion for the application of any doctrine of restitution and

¹²In that case the rates collected during the period covered by the injunction, improvidently issued, were in excess of the rates at the time being lawfully prescribed by the Florida Railroad Commission. In our case the charges collected by the appellees from their clients during the duration of a providently made temporary restraining order were duly filed and published charges, less by ten per cent. than the charges entered by the Secretary in a valid order previously entered. (*cf. Arizona Grocery Co. v. A. T. & S. F. R. R. Co.*, 284 U. S. 387.)

there is no restitution proceeding possible for the statutory court to have jurisdiction over. Since no other "case" or "controversy" has been suggested, the monies paid over by the shippers to the appellees, which constitute the impounded fund, represent monies which were lawfully collected, and there is no justification for their being retained by the statutory court as appellants demand.

III

THE SECRETARY IS WITHOUT POWER TO MAKE A NUNC PRO TUNC, PREDATED OR RETROACTIVE ORDER IN THE REOPENED PROCEEDINGS NOW PENDING BEFORE HIM.

In their "motion for order staying distribution of impounded moneys" in the Court below (R. 184-186) the appellants alleged that

"4. On June 1, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the aforesaid order of June 14, 1933, was entered" (R. 185).

It was further alleged that

"* * * In the proceeding reopened by the said order of June 1, 1938, the Secretary, as provided by the rules of procedure adopted for such cases on September 14, 1936, will accord to petitioners every right to which the Supreme Court of the United States has held that they are entitled. After full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them. That order will finally determine * * * all the questions decisive of the rights

of the parties herein and of the shippers in the moneys impounded in this Court * * * (R. 185).

Accordingly, appellants prayed that the funds be held

"until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction or until further order of this Court" (R. 186).

The theory upon which the appellants sought a stay and resisted distribution, as evidenced by their motion was thus that the Secretary may now enter a *nunc pro tunc* order as of June 14, 1933, which, when entered, will have the same force and effect as if it had been entered upon that date, and may be attacked only upon the same grounds as if it had been entered then. The appellants' brief in this Court is devoted chiefly to the asserted existence of such power in the Secretary. If such power is non-existent, then further withholding of the impounded funds until the Secretary shall make some further order, which he is without power to make, would be both futile and manifestly unjust to the appellees, even assuming, contrary to the arguments already made, that the appellees are not now entitled as a matter of right to their release.

1. Except in reparation cases, the statute forbids the Secretary to make orders affecting completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

The Secretary may, of course, exercise only those powers delegated to him by the Congress, and then only in the

manner prescribed and subject to the limitations, if any imposed by the Act upon the exercise of the powers delegated.

The Act provides that any person who believes himself aggrieved by the exaction of an unreasonable rate filed with the Secretary, may in accordance with the Act (Section 306) file a complaint seeking (1) damages for the exaction of such unreasonable rate, in the past, (2) the naming of a new rate for the future, or (3) for both [Sections 309 (a) and (e) and Section 310]. Upon the filing of such complaint the Secretary, if damages are sought, may "make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named" [Section 309 (e)]. Upon such complaint, if the making of a new rate for the future is sought, the Secretary may also "after full hearing" and if he is

"of the opinion that any rate * * * is or will be unjust, * * * determine and prescribe what will be the just or reasonable rate or charge, or rates or charges, to be *thereafter* observed in such case."

In a proceeding instituted by complaint, the Secretary may therefore, according to the issues raised thereby, determine what "will be the reasonable rate to be thereafter observed" and what was the reasonable rate which should have been charged in the past during the period covered by the complaint.

The Secretary may also

"at any time institute an inquiry on his own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made" [Section 309 (c)]

The proceeding in which the order of June 14, 1933 was entered and which has now been reopened was instituted by the Secretary on his own motion (R. 231). In a proceeding so instituted the powers of the Secretary are both defined and limited as follows:

"The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, *except orders for the payment of money.*" [Section 309 (c)]

The Act thus expressly prohibits the Secretary from making any award of damages in the proceeding now pending before him.¹³ In this type of proceeding he may only

¹³Although it is, of course, sufficient that Congress has so provided, it might not be amiss to take note of the fact that this is an exceedingly sensible arrangement. The concept of reasonable rates, particularly for personal services, is a vague and uncircumscribed one. (*Acker v. U. S.*, 298 U. S. 426; *Morgan v. U. S.*, 304 U. S. 1, 21.) If shippers are willing to let well enough alone, what reason is there for a public official to volunteer on their behalf to make them unsatisfied? In this very case the difference between the Secretary's rates for selling a sixteen-hundred pound steer and appellants' tariff rates is about ten cents a head. This amounts to less than $\frac{1}{100}$ of a cent per pound. The commission men who perform the selling services have absolute discretion in the acceptance of offers. They bargain with the buyers of the packers for the best price they can get. Under the circumstances it is hardly unreasonable to suppose that the owner of cattle may prefer to pay to market agencies what the latter consider just compensation, rather than risk unsatisfactory service at a gain of $\frac{1}{100}$ of a cent

"determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case." [Section 310 (a)]

But whether exercised on complaint or on his own motion, such determination and order may be made only "after full hearing" (Section 310).

2. Unless the order now proposed to be made ought to have been made then, it could not be entered *nunc pro tunc* even in a court proceeding, much less under a statute which expressly prohibits the Secretary from making an order except "after full hearing".

The Congress thus imposed two limitations upon the exercise of the powers delegated by it to the Secretary. First, in a proceeding instituted on his own motion, as this one was, he may not award damages or reparation for the exaction of unreasonable rates in the past. Recognizing

a pound. The cutting down of the owners of these market agencies to an average of forty-eight cents a day for their services and the causing of the two largest concerns at the stockyards, each doing a business of ten million dollars a year, to have deficits, may well make such a result seem sufficiently obvious. (See Point IV, appellants' brief in *Morgan v. U. S.*, No. 581, Oct. Term, 1937 and p. 132 *post.*) The rule of this Court laid down in *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U. S. 531, to the effect that reparation must be measured by the difference between reasonable rates and the rates actually charged and that the actual damage need not be proved is all the more reason for permitting shippers to be satisfied with the charges they have paid. By saving ten cents a head on commission charges they may well lose ten dollars a head through incompetent service.

such limitation, the appellants would seek to attain accomplishment of the same result by the entry of a *nunc pro tunc* order fixing rates for the future as of June 14, 1933, but the statute also expressly limits the power of the Secretary to make such an order, except "after full hearing". This Court has held that on June 14, 1933 this requirement of the statute prerequisite to the entry of any order had not been observed. To ask this Court to hold that the Secretary may nevertheless make a *nunc pro tunc* order as of such date is not to invoke the power of this Court to construe and interpret the statute, which alone governs the powers of the Secretary, but to ask it by judicial legislation to confer upon him a power expressly withheld, to wit, the making of an order to speak as of a date prior to the observance of this express statutory requirement. This alone should be sufficient to dispose of the Government's contention that he may enter such an order.

As is well known, courts sometimes make what are known as *nunc pro tunc* orders. An examination of the authorities will show, however, that the circumstances under which these can be made are exceedingly circumscribed. It is only when the order could properly have been made at the time to which it is related back that a court is permitted to enter a *nunc pro tunc* order. *Black on Judgments* (2d ed., 1902), Section 133. The sole legitimate purpose is to correct the record so as to make it speak the truth as to the order which was actually made (*cf. Gagnon v. United States*, 193 U. S. 451). The power is to be exercised to correct clerical, not judicial, errors. *Black, op. cit. supra*, at Section 132.

But even if a court were empowered in judicial proceedings to enter a *nunc pro tunc* order affecting substantive

rights and of the character now sought, the Secretary is without power so to do, because of the statutory requirement that an order fixing or purporting to fix rates for the future may be made only after full hearing.

On June 14, 1933, without according appellees a "full hearing" such as the statute requires, the Secretary issued the order which this Court has held invalid because of a "vital defect", not a mere "irregularity in practice" (304 U. S. 1, at p. 22). No order could have been made, much less ought to have been made, on that date. This Court has held that the order which was attempted to have been made on that date ought not to have been made. Thus, there is absolutely no room for the application of any *nunc pro tunc* doctrine to this situation.

On June 14, 1933, the Secretary was merely in the middle of a hearing.

The absence of a full hearing at the time the order was entered cannot be supplied retroactively by according to the respondents the right to a full hearing now. Only after such a hearing has been had may the Secretary exercise the power conferred upon him to fix rates for the future. Since on June 14, 1933 the respondents had not been accorded a full hearing, the Secretary could not, under the facts of this case, have entered the order now proposed to be made *nunc pro tunc* as of that date. Indeed, if the report and findings and the Secretary's order then entered as a final order had on that date been served upon the respondents, the Secretary could not have entered an order as of that date because the requirements of a full hearing as laid down by this Court in its decision could not have been met until the respondents had been given an opportunity to except thereto and the Secretary had reached an

independent judgment, in a proceeding in which up to that time he had exercised none, by a consideration of the case in the light of the objections taken and the exceptions urged.

As the Court declared in its prior decisions in this case, the order must be supported by findings essential to its validity, which, in turn, must be supported by evidence. The Secretary may not consider those matters which he should not consider, and must consider those matters which he should consider. Moreover, as said by the Court in both of its prior decisions in this case, the findings must be those of the Secretary himself and not those of his subordinates. Such are the duties of the Secretary, and no valid order may be made for the future until they have been exercised. They had not been exercised on June 14, 1933. They have not been exercised now. They cannot be exercised until some time in the future. Until they are exercised, no order may be made; and such order, when made, can speak only as of a date after their exercise and not before.

As the Court points out:

"The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps" (304 U. S. at p. 20).

The concluding part of the procedure, namely, the Secretary's consideration of the respondents' exceptions to the findings and order prepared by the Secretary's subordinates and of the record, has not yet taken place and cannot take place until some future date. Without it the hearing required by the statute as written and as interpreted by this

Court has not been completed. No valid order may be made until its completion, and upon its completion such order manifestly may speak only as of the future and not as of a date prior to the completion of the hearing requisite to the validity of any order which the Secretary may make. Appropriate findings sufficient to sustain the order are again essential to its validity. As the Court points out in its opinion on the second appeal and on rehearing, the findings made by the active prosecutors for the Government, and which the Secretary adopted, without notice to the respondents or opportunity to be heard, were "180 in number" and "elaborate". As the Court points out in its opinion on petition for rehearing, these "findings of fact necessary to sustain the order had not been made by him upon his own consideration" but had been prepared "by those who had prosecuted the case for the Government" and "were adopted by the Secretary" (304 U. S. 1 at p. 24). Such action, the Court said, failed "to satisfy the requirement of a full hearing". Unless and until the Secretary, after consideration of the record, and after hearing the respondents upon their exceptions to the findings prepared by such active prosecutors, which have now been served upon the respondents as a tentative report, has himself made such findings as he then thinks it proper to make, there has been no hearing and there can be no order.

Boiled down to its simplest terms, therefore, the contention of the appellees is that the Secretary may not make a *nunc pro tunc* order purporting to speak as of June 14, 1933, which he could not have made at that date. This is so even if, after according to the respondents the full hearing previously denied, he reaches the conclusion that if he had been in the position on June 14, 1933—which the Court

has said he was not—to fix for the future the rates prescribed in the invalid order of that date, he would have done so. To accept any other view of the Secretary's powers would be to deny to the respondents ~~in substance~~ that right to a full, fair and open hearing *preceding* determination by the Secretary, without which, the Court has said, any order entered by him is a nullity.

The vice in the old order was that the findings upon which the order was predicated and which had been prepared by the "active prosecutors for the Government" were accepted by the Secretary without opportunity to the respondents to be heard in respect thereto. It is wholly untenable to suggest that by a re-adoption of these findings after hearing the Secretary may date them back to the date of the old order *before* hearing. We know no theory upon which the right either of a court or of an administrative body to enter a *nunc pro tunc* order can be extended to a case where no order could have been lawfully made as of the date from which it is attempted to be given effect.

3. The appellants' contention that the order will not be retroactive is without merit.

It is the Government's contention that, "In any proper sense the reconsidered order of the Secretary will not be retroactive. The District Court, if it finds that the Secretary has properly entered a valid order in the further proceedings, will direct distribution of the impounded fund on the basis of that order. The retrospective effect of the order in such event will be precisely what it would have been if after five years of litigation the Secretary's order had been sustained and the District Court had distributed

the impounded fund to the farmers. In either case, the effect is to reach back in time to place the parties where they should have been from the beginning" (Brief, pp. 61-62).

Since the order proposed to be made by the Secretary will have no effect upon any transactions except those consummated transactions which resulted in the creation of the impounded fund and he cannot fix any rates for the future, it will be clearly retroactive in its effect and intended to be. Whether or not, however, it is retroactive "in any proper sense", it cannot be made, because the statute expressly forbids the Secretary to make orders for the payment of money upon his own motion and expressly restricts him in such a proceeding to the making of rates "to be thereafter observed" and "after full hearing". Thus, it will not avail the appellants to compare what the Secretary proposes to do with what courts or legislatures may properly do.

If the Secretary's order had been held valid, the District Court would have awarded the impounded funds to the shippers in the event the market agencies had refused to refund. It would in such case have been merely carrying out the terms of its own impounding order. Whether or not such action is retroactive it would be within the power of the Court, which unlike the Secretary in his quasi-legislative capacity is empowered to act with respect to the past. As said by Mr. Justice Holmes in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210 at page 226:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.

That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, * * *

If, as is clear, the Secretary in this quasi-legislative proceeding upon his own motion cannot make an order governing consummated transactions, then as we show in Point IX, pages 123-128 *post*, no cooperation on the part of the Court, itself without power in the premises, can be employed to give life to an order made in the absence of power.

Nor is the analogy to legislative acts having some retroactive effect any more compelling. Tax cases such as *Milliken v. U. S.*, 283 U. S. 15 and *U. S. v. Hudson*, 299 U. S. 498, 501, are cited. *Swayne & Hoyt, Ltd. v. U. S.*, 300 U. S. 299, 301-2, and *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-30, are referred to. It is wholly unnecessary, however, in this argument to consider such cases. We are not here dealing with the constitutional power of Congress to enact legislation of limited retroactive effect or to ratify the technical defective acts of the Executive. Congress, of course, as the law-making delegate of the people can enact legislation without reference to any specific type of hearing. The fact that the legislation represents its will is sufficient. *Seuthern Ry. Co. v. Virginia*, 290 U. S. 190 at page 197. But even as to the power of the legislature the appellants have cited the Court to no authority to the effect that either Congress or a State legislature may fix rates to govern consummated transactions. It has been commonly

supposed that such power is limited to the fixing of rates for the future, and it would seem that a legislative act which sought to fix rates to be applicable to past transactions would not only be beyond the scope of the legislative power but would constitute a deprivation of property without due process of law.

However that may be, it is clear that the Secretary who acts as an agent of the Congress, has no general legislative power or authority. He can seek to attain the legislative purpose solely by means of the procedure specifically authorized by Congress as is fully demonstrated in Point V, pages 59-99 *post*. The legislative power delegated to him may be exercised only under the conditions pursuant to which it was delegated. Thus he may act only "after full hearing". No such limitation, of course, is imposed upon Congress itself. Thus, whether or not Congress can pass acts of limited retroactivity to govern particular situations, such limitations have been expressly imposed upon the exercise of the Secretary's powers that when acting upon his own motion in a quasi-legislative proceeding his order may speak only for the future. This distinction between the action of Congress and that of an administrative tribunal is pointed out in *Southern Ry. Co. v. Virginia*, *supra*.

In so far as the Government's argument that the order will not be retroactive is based upon the asserted analogy to judicial proceedings generally or upon the decision of this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301, it will be dealt with in succeeding sections of this brief.

ANY POWER WHICH THE SECRETARY MAY EVER HAVE HAD TO DETERMINE THE REASONABLENESS OF THE APPELLÉES' CHARGES PUT IN ISSUE BY THE PROCEEDING IN WHICH HIS INVALID ORDER OF JUNE 14, 1933, WAS MADE, IS NOW EXHAUSTED.

As we have pointed out, the Secretary is without power in a proceeding instituted on his own motion to make any award of damages or any order affecting transactions occurring prior to the entry of a valid order. Congress might have provided that in such a proceeding the Secretary might not only establish rates "to be thereafter observed", but award reparation on past transactions occurring either prior to the institution of such proceedings or during their pendency if he found the rates charged were unreasonable for such period or any part thereof. Congress did not choose to confer such power upon the Secretary, but limited his power to the making of rates for the future.

Any proceeding instituted by the Secretary on his own motion, however, necessarily does put in issue the reasonableness of the charges in effect at the time of its institution, not only as applied to the present or future, not as to the past. This is so because he may prescribe a different rate for the future only if he is of opinion "after full hearing" that the existing rate "is or will be unjust, unreasonable or discriminatory" (Section 310). Such a determination is jurisdictional.¹⁴ *I. C. C. v. Louisville & Nashville R. R.*,

¹⁴Thus, contrary to appellants' argument (Brief, p. 37) the Secretary lacked jurisdiction on June 14, 1933 to proceed to the making of a rate for the future, for he had made no legal finding that the existing rates were unreasonable.

227 U. S. 88, 92; *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 82.

As appears from the Secretary's order now set aside, the proceeding in which it was entered was instituted by an order of inquiry "into the reasonableness and lawfulness of all rates and charges provided in the tariffs of the respondent market agencies at the Kansas City Stockyard". Said order of inquiry and notice alleged:

"that in accordance with the requirements of said Act respondents *had theretofore filed*, published, and put into effect a schedule of rates and charges for their services as market agencies as set forth in their tariffs and supplements thereto; that the interest of shippers, producers of livestock who patronize respondent agencies and the public generally require that inquiry be instituted under Title III of the Act for the purpose of determining the reasonableness and lawfulness of the rates and charges of all respondents named therein *as set forth in their tariffs and supplements thereto*" (R. 21).

The Secretary thus instituted an inquiry into the reasonableness of the charges named in the tariffs then on file and referred to in his order for the purpose only of exercising power conferred to determine what rates should be thereafter observed. On June 14, 1933, the Secretary made the order now set aside. With the entry of this order all issues as to the reasonableness of the previously existing charges to which the inquiry had been directed became moot. Had the Secretary thereafter reopened the proceedings for the purpose of determining whether there should be some modification of such order, the inquiry then would have

related to the reasonableness of the rates prescribed in the order, not to those which had preceded it.

The order of the Secretary, however, was not permitted to become effective and has now been set aside. In the meantime, during the pendency of the litigation the Secretary caused the proceedings to be reopened and entered therein a new and modified order superseding his order of June 14, 1933, and prescribing the rates to be observed on and after November 1, 1937 (R. 191-194). Upon the entry of this order the subject-matter of the inquiry as originally instituted, to wit, the reasonableness of the charges in effect at the time of its institution, came to an end and any issue as to their reasonableness became moot. The rates prescribed in the modified order of October 14, 1937, were therefore the rates in effect at the time the Secretary again reopened the proceedings on June 1, 1938, subsequent to the decision of this Court. The Secretary may, of course, either by the institution of a new inquiry on his own motion, or by a reopening of the proceeding in which both the order of June 14, 1933, and that of October 14, 1937 were entered, enquire into the reasonableness of the rates *now* being charged under the latter order, and after hearing prescribe other and different rates for the future. In such a proceeding, the Secretary would then be required to determine the reasonableness of the rates *now* in effect as a condition precedent to the entry of a new order prescribing other and different rates for the future. The issue presented in such a proceeding would be the reasonableness of those charges, not of those in effect at the time of the original inquiry which has now been superseded by the order of the Secretary now in force. There is, thus, now pending before the Secretary no issue in respect of the reasonableness of the

charges in effect at the time of the original order of inquiry and continued in effect *pendente lite*. That issue has become moot.¹⁵ A determination of their reasonableness would not be material to any inquiry which the Secretary may now make into the rates to be hereafter charged. And since he is expressly forbidden to make any order for the payment of money, the reasonableness of the old charges, no longer in effect, may not be put in issue in that proceeding for the purpose of providing a predicate for such an order.

In the reopened proceedings now pending before the Secretary there is, therefore, now no issue and, under the statute, may be none, concerning the reasonableness of the previously existing charges. While he has undertaken to inquire into the same, such inquiry is without authority of law, even in the exercise of his power to establish rates for the future.

¹⁵If these rates had not been changed so as to terminate the impounding, the only rates which could have been charged after the Secretary's order was invalidated would have been the filed rates. Neither Secretary nor Court could have suspended them pending a new order of the Secretary. This of itself refutes the contention of appellants discussed in Point V, pp. 59-99, *post*, to the effect that procedure must always be subordinated to substance under the Act.

V

THE GOVERNMENT'S CONTENTION THAT THE COURT SHOULD MOLD THE STATUTE TO EFFECTUATE THE SO-CALLED SUBSTANTIVE PROVISIONS OF THE STATUTE BY PERMITTING THE EMPLOYMENT OF AN EXTRAORDINARY REMEDY NOT PROVIDED FOR THEREIN IS WITHOUT SUPPORT IN THE STATUTE ITSELF, CONTRARY TO THE LEGISLATIVE POLICY OF CONGRESS AS EMBODIED IN THE ACT, AND REPUGNANT TO SETTLED PRINCIPLES OF ADMINISTRATIVE AND CONSTITUTIONAL LAW.

The Government points to no provision of the Act empowering the Secretary to proceed in the manner proposed or conferring upon the Court the power to permit the extraordinary remedy suggested to be followed. As we have seen, there is none. The Government in its brief, after referring to the substantive requirements of Section 305, says:

"The Act thus provides merely a general statutory framework and wisely does not attempt to articulate the infinite details of procedure. Doubtless Congress had in mind that this Court has power to mold the statute to effectuate substantive justice. Cf. Landis, *Statutes and Sources of Law* (Harvard Legal Essays, 214). This generality of the enactment makes it all the plainer that these procedural sections of the Act were designed merely to afford a means of attaining the goal which Congress set in Section 305, namely, that 'all rates * * * shall be just, reasonable, and nondiscriminatory' " (p. 20).

Otherwise, it is said, the substantive requirements of the Act become subordinated to its procedural provisions.

This argument overlooks the fact that Congress did clearly and carefully articulate the *fundamental* requirements of procedure, if not its unimportant details. These are that the Secretary may act only *after full hearing*; that he may make rates for the future either upon complaint or upon his own motion, but may determine what were the reasonable rates to have been charged in the past, including the period covered by proceedings pending before him or in court, as well as before, *only* in reparation proceedings brought before him in the manner provided by the statute. The Government does not contend that the procedure which the Secretary is proposing to follow complies with the statutory procedure or is within the powers specifically conferred upon the Secretary. On the contrary, it is asking the Court to give its sanction to the exercise of powers expressly withheld by the statute because those granted are inadequate in its opinion to protect what the Government erroneously conceives to be the substantive rights of the shippers.

To say that the Court may mold the procedure (where the procedure is defined by the statute) to suit the substantive provisions is to say it may legislate and in so doing confer upon the Secretary powers expressly withheld. Neither the Secretary nor any other administrative tribunal has any inherent power. It may exercise only those conferred and in the manner prescribed by the statute for their exercise. The Court has those powers inherent in a court but no power to confer powers upon the Secretary, to free him from those limitations upon the exercise of his powers imposed by the Congress, or to "evolve" remedies in addition to those provided for because the Congress has seen fit to provide remedies which are less complete than the Government thinks they should be. This is not to interpret but to

legislate. Moreover, if there is a gap in the law, it was one which must have been obvious to this Congress since the same gap exists in the Interstate Commerce Act, which has been on the statute books for fifty years.

These considerations alone warrant affirmance of the order below. Moreover, the argument is based upon a complete misconception of the legislative policy of Congress as embodied in the Act, and of the relation between its so-called substantive and procedural provisions as enacted.

1. The prior decisions of this Court in this case constitute a complete answer to the distinction attempted to be made between the effect of substantive and so-called "procedural" errors. Its acceptance would be (1) to disregard the express statutory limitation upon the exercise of the Secretary's power, (2) to deny to appellees substantive rights guaranteed to them by the statute and the Constitution and (3) to violate settled and fundamental principles of administrative law.

The Government throughout its brief treats the defect by reason of which the order was set aside as a mere "procedural" defect or "procedural slip" and, by so doing attempts to draw a distinction between so-called "procedural" errors and the violation of substantive rights. But that which the Government regards as merely "procedural" and formal this Court said constituted a "vital defect" resulting in the denial to the respondents of a substantive right—to wit, the right to a full and fair hearing. To permit the Secretary to cure this "vital defect" by a *nunc pro tunc* order would be not only to override the express statutory limitation upon the exercise of the Secretary's powers but would

be repugnant to fundamental requirements of administrative action which lie at the foundation of administrative law, both substantive and procedural.

This Court in its opinion on the second appeal states that plaintiffs' contention was "that the Secretary's order was made without the hearing required by the statute". This question, the Court says

"goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1, at p. 14).

A "fair and open hearing" is said to be an inexorable safeguard of the rights of those dealt with by such agencies. Congress, it is said,

"explicitly recognized and emphasized this requirement by making his [the Secretary's] action depend upon a 'full hearing'" (p. 15).

The Court points out that

"Congress, in requiring a 'full hearing', had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (p. 19).

It then points out that in this case the Secretary accepted and made his own the findings which had been prepared

"by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (p. 22).

that, the Court said:

"is more than an irregularity in practice; it is a vital defect" (p. 22).

no opportunity, the Court says,

"was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order" (p. 17).

In its opinion on petition for rehearing the Court points

"that findings of fact necessary to sustain the order had not been made by him [the Secretary] upon his own consideration of the evidence but as stated below" (p. 24).

these findings, said the Court,

"prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied" (p. 24).

It was by reason of such conduct upon the part of the Secretary that the Court held that the Secretary had not accorded to the respondents the "rudimentary requirements of a fair play" (p. 15); and because of his failure so to do the order aside.

Failure so to do, as the Court said, constitutes

"more than an irregularity in practice; it is a vital defect" (p. 26).

The error committed by the Secretary was therefore not a mere "procedural" error of a formal character, subject to being corrected by a subsequent order dated back to the date of the first.

In its opinion on the first appeal, this Court said:

"The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department" (298 U. S. at p. 478).

* * * * *

"It is no answer [to the contentions of the market agencies] to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. * * * (p. 481)..

"The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the

performance of it in a substantial manner is inseparable from the exercise of the important authority conferred" (pp. 481-2).

The requirement that the administrative officer or tribunal to whom Congress has delegated its legislative authority must himself find the facts lies thus at the foundation of all administrative law, both substantive and procedural. It is upon the assumption that he has done so that his findings are conclusive upon the courts if supported by evidence. As appears from the record made at the second trial and as recited by the Court in its opinion on the second appeal, the Secretary did not observe this fundamental requirement. As the Court said in its second opinion:

"The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows:

" 'My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry.'

"Save for certain rate alterations, he 'accepted the findings' " (p. 18).

The findings which he accepted were made, as the Court said, by the active prosecutors for the Government.

To permit errors such as these to be corrected by a *quint* *pro tunc* order is to put a premium on snap judgment, upon denial to respondents in proceedings before administrative tribunals of their substantive rights not only to a fair hearing but to fair and impartial determination of the issues of

fact as well as questions of administrative policy by the officer or tribunal to whom Congress has delegated its powers. If the denial of these rights may be corrected by *nunc pro tunc* orders and subsequent but predated determinations, the right of such respondents to their fair and impartial determination by an officer or tribunal approaching them with an open mind is effectively destroyed. It is not in human nature to suppose that such an officer or tribunal, which has already committed itself to findings and orders made in violation of this fundamental requirement of administrative law, will approach a second determination with the same open mind as if that requirement had been met when it should have been met. But in any event, since the statute prevents the Secretary from making an order fixing rates in the future until after full hearing, no determination or order in this proceeding now made but entered *nunc pro tunc* as of a date before there had been such a hearing is permissible under the statute, but would be directly repugnant to its express provisions.

Moreover, if the contentions of the Government are sound, the Secretary may, by a *nunc pro tunc* order or a series of *nunc pro tunc* orders, correct errors successively made until one conforming to both the formal and substantive requirements of the statute has been finally entered. In the judgment of the appellees, the Secretary in the reopened proceedings has already committed serious "procedural" errors which, under the decisions of this Court, would vitiate any order which he now proposes to make. If the contention of the Government is correct, he may thereafter, by another *nunc pro tunc* order, cure these errors. In the meantime, funds impounded as security

against the wrongful issuance of a temporary restraining order—which it now appears was rightfully issued—must be withheld until the Secretary corrects not only the errors by reason of which his first order was set aside, but those upon which his second order may be set aside as well. The acceptance of the Government's contention would thus, in effect, deny to respondents in administrative proceedings the right to contest their validity by permitting the Secretary, by a *nunc pro tunc* order or successive *nunc pro tunc* orders, to make a predated order which, when made, if supported by evidence, will have the same force and effect as if made at the time his invalid order was entered.

Indeed, the Government in its brief states that "a procedure similar to that for which we now contend would be equally applicable to errors of substance, so long as they were of such a character that the order of the Secretary might yet be corrected, such as error in the admission or rejection of evidence" (Brief, p. 71). On the same principle, it would appear that the suggested procedure would be equally applicable if the order were set aside because the findings were unsupported by the evidence if thereafter this defect were cured.

The attempted distinction between procedural and substantive errors is largely a play on words.

The Court is not permitted to pass upon the only substantive question presented in a proceeding before the Secretary or any other administrative tribunal, *i.e.*, the reasonableness of the rates themselves. It may only determine whether he acted in the manner prescribed and within the powers conferred by the statute. In the sense in which the Government uses the word all these questions—the only ones which the Court may decide—are procedural. But

they are also substantive because if the Secretary has not acted in the manner or within the powers prescribed by the statute, those against whom his order is directed have been deprived of their substantive rights. As a consequence, if the order is permitted to stand, they will have been deprived of their property or their liberty of action or both without warrant of law—a denial of the most important substantive right possessed by all free men under a government of laws and not of men. This is so whether the order is void because of the lack of a full hearing, because unsupported by findings, because the findings are unsupported by substantial evidence, or for any other reason." In this case the order was set aside because of the Secretary's disregard of the most fundamental of all substantive rights—that of a full and fair hearing.

2. The Government's contention is based upon a misconception of the legislative policy of Congress as embodied in the Packers and Stock Yards Act and is directly contrary thereto.

According to the Government, the whole legislative policy of the Act is embodied in Section 305. All other provisions are to be disregarded. Although the requirements of this section are not self-executing, and although Congress itself provided the manner in which they are to be effectuated, the mechanism provided by Congress for this purpose is not exclusive. If the statutory mechanism is ineffective to bring all rates at all moments of time into conformity with the substantive requirements of Section 305, the Court may and should evolve additional and substitute procedural mechanisms to implement further the

substantive requirements of the Act. So runs the argument.

This contention is wholly repugnant to the separation of powers as between the legislative, executive and judicial departments of the Government provided for in the Constitution. It is equally repugnant to the policy of Congress as embodied in the Act. The legislative policy of Congress must, of course, be determined from the Act itself and from reading all of its provisions together. So read, it is plain that the legislative purpose was not that attributed to Congress by the Government, and that Congress intended that the substantive requirements of the Act should be effectuated only by the means and with the limitations provided in the statute by Congress. That this is so appears not only from a reading of the Act itself but conclusively appears from a consideration of the legislative history of the Interstate Commerce Act upon which the Packers and Stock Yards Act was not only patterned, but from which its essential provisions were copied almost verbatim (pp. 78-97, *post*).

Without the enactment of the requirements of Section 305 as a standard, the Act would certainly be void as a delegation of legislative power. As in the Interstate Commerce Act, however, this standard or substantive requirement is not self-executing. It may be effectuated only in the manner provided in the sections which follow. These sections, dismissed by the Government as merely procedural, are as much a part of the legislative scheme as is the standard itself. The substantive rights of both the market agencies and the shippers, and the powers of the Secretary, are limited by them and may be exercised and enforced only according to their terms.

All market agencies doing business at a public stockyards must file their charges with the Secretary (Section 306), which, when filed, become the only lawful charges (Section 306 (f)), whether in fact unreasonably high or unreasonably low, until displaced by other rates voluntarily filed in the manner prescribed by the Act (Section 306(c)) or by a *valid* order of the Secretary prescribing other rates for the future only, and then only after a full hearing. The market agencies are required to collect and the shippers to pay charges so filed under the criminal penalties imposed by the Act. If the charges filed are unreasonably high, the shipper must nevertheless pay them, and the charges which he has paid in the past may be brought into conformity with the substantive requirements of Section 305 only by invoking the reparation provisions of the Act, which may be set in motion only upon his own complaint and within the limitations of time prescribed in the Act. He must also continue to pay such unreasonably high charges for the future until displaced by others made in accordance with its provisions. A continued and continuing application of the standard as applied to all transactions, past, present or future is thus rendered impossible by the terms of the Act itself. Even should the market agency concede the unreasonableness of the charge, it may not charge less for the future until superseded by lower rates or voluntarily pay back to the shipper the difference between a reasonable and unreasonable charge except in response to an award of damages (Section 306).

The requirement that all charges shall be just and reasonable means of necessity just and reasonable to the market agencies as well as just and reasonable to the shippers.

Texas & Pacific Ry. Co. v. I. C. C., 162 U. S. 197, 219; *I. C. C. v. Cincinnati No. & T. P. Ry. Co.*, 167 U. S. 479, 511 and numerous cases decided by the Interstate Commerce Commission cited in Senate Document No. 166, 70th Cong., 1st Sess., *Interstate Commerce Acts Annotated* (1930, U. S. Gov't Printing Office) Vol. I, page 315, annotations to Sec. 1, subd. 5, note 3. If the filed charges are or become unreasonably low, the market agency must still continue to receive them in full satisfaction of its services until displaced by a newer and higher charge to be filed in accordance with the provisions of the Act, although thus deprived of the receipt of a rate conforming to the substantive requirements of Section 305.

Upon the filing of such higher charges having for their purpose the bringing of charges into conformity with the standard of the Act, the Secretary is empowered to suspend such charges for a total period of 60 days pending hearing as to their reasonableness. If at the expiration of such period the Secretary finds the advanced charges to be reasonable, no provision is made for the recovery by the market agencies from the shippers of the difference between the old and the new charges, or for the impounding of funds during suspension, so as to insure to the market agencies the receipt of reasonable rates from and after their attempted inauguration, in order to insure to the market agencies the receipt of rates conforming to the substantive requirements of Section 305. Under the correlative provisions of the Interstate Commerce Act, this suspension power may be exercised for a total period of 150 days (Section 15) without any provision for protecting the carrier by impounding of funds or otherwise in the receipt of a rate conforming to the statutory standard.

It is provided by Section 313 that orders of the Secretary, other than orders for the payment of money, shall continue in force until the further order of the Secretary. Whenever the Secretary, therefore, in a proceeding instituted either upon complaint or on his own motion, validly prescribes rates for the future, those rates and no others must be charged by the market agency until modified or affected by subsequent order. If such rates—reasonable when made by the order of the Secretary—thereafter become unreasonably low, they may not be advanced to a level conforming to the substantive requirement of Section 305 that they shall be just and reasonable both to the market agencies and to the shippers until after, in further proceedings by the Secretary, new and higher rates are prescribed or permitted to be made. If there is controversy as to their reasonableness, this may be done only after further proceedings and hearing, the issues in which will be precisely the same as where proceedings are instituted for the purpose of effectuating a decrease in the charges. In the instant case, protracted hearings were had before the Secretary. The proceeding was pending before him for a period of over 3 years before the order now set aside was entered. The statute makes no provision whereby, if the charges are permitted to be advanced, they may be brought into conformity with the requirements of Section 305 for the period during which the re-opened proceeding was pending or in a suspension case.

If in such a proceeding or in a suspension case the Secretary should deny to the market agencies the right to advance their charges, his order would be subject to review by the institution of suit similar to that in which his order of June

14, 1933 was set aside. If, at the conclusion of such litigation, the court should hold that the Secretary's order denying to the market agencies the right to advance their charges was invalid upon any of the grounds upon which the orders of an administrative tribunal may be attacked, it would be the duty of the court to set the same aside, but the court would be without power in such proceeding to determine what charges the market agencies were entitled to make for the future or should have received in the past. If in a suit brought to test the validity of an order made either in a suspension proceeding or in a proceeding for a modification of a previous order of the Secretary, in order to bring the rates up to the legislative standard, the court should hold that the Secretary exceeded his power in refusing such relief to the market agencies, the statute makes no provision whereby either the court or the Secretary can make the market agencies whole by some sort of proceedings or orders under which the lower rates charged in the interim may be brought into conformity with the legislative standard. Nor could the court in such a case require—as it may where the suit is one to set aside the order of the Secretary reducing rates—that the difference between the lower rates then in effect and the higher rates sought to be imposed by the agencies be impounded to abide the result of the litigation. So to do would be in effect for the court to require the higher rates to become effective during the period of the litigation and thus take unto itself the power to fix temporary rates pending its determination, a power which has not been conferred upon it.

If the court may mold the statute so as to effectuate the substantive requirements of Section 305 by

evolving a "procedural mechanism" not provided for in the Act, where it is claimed that the rates charged during the progress of the proceedings before the Secretary or in court were unreasonably high, it should have the correlative power similarly to mold the statute for the purpose of effectuating the substantive requirements of Section 305, where the contention is that the rates charged during the pendency of administrative or court proceedings are below the legislative standard. Yet if in such a case the market agencies should ask the court to evolve a procedural mechanism for this purpose, the Government and the Secretary would be the first to insist that it was possessed of no such power and rightly so, because Congress, despite the substantive requirements of Section 305, has not itself provided the means—as it might, had it seen fit to do so—whereby rates charged during the pendency of either administrative or judicial proceedings should at their conclusion be brought into harmony with the substantive requirements of the Act, whether out of harmony therewith because too high or too low.

Examination of the Act as a whole, therefore, demonstrates that by the enactment of Section 305 Congress did not intend to confer substantive rights either upon the shippers or upon the market agencies, to be enforced and made effective at every moment of time—whether before or during the pendency of proceedings before the Secretary or in court—but only in the manner and subject to the limitations imposed by the so-called procedural sections of the Act, by which alone the substantive requirements were to be effectuated. Congress clearly contemplated, as it must, that despite the substantive requirements of Section 305 there would be times and occasions of varying periods

of duration within which the rates charged would fail to conform to such substantive requirement because either too high or too low. It made no provision for such contingency. Having made none, the court may make none unless it is going to proceed by judicial legislation to confer powers upon the Secretary or rights upon the farmers or market agencies—as the case may be—not provided for in the statute.

It may be pertinent here to point out what provisions the Act does not contain, but which might have been included therein if Congress had seen fit to adopt a legislative policy in harmony with the contentions of the Government. It might have provided, as do the statutes of many States regulating the rates of public utilities, that within a reasonable time after the enactment of the statute the Secretary should himself establish the reasonable rates to be charged, and that no rate might thereafter be changed without his approval. It might have provided that in proceedings instituted on the Secretary's own motion he should have power to determine not only whether the rate then in effect *"is or will be unreasonable"*, but whether it was also unreasonable for the past, and if so, require the making of reparation for the appropriate period. It might have provided that either in suspension proceedings or in proceedings reopened for the purpose of determining whether rates previously made by the Secretary should be advanced, the difference between the old charge and the proposed new charge should be impounded, the impounded funds to be disposed of in accordance with the determination finally reached by the Secretary,¹⁶ thus insuring conformity to the

¹⁶The Public Service Law of New York (Sec. 113) so provides whenever an advance in the rate is proposed.

requirements of Section 305 during the pendency of the case, whatever its outcome.¹⁷ It might have provided that in a suit brought to set an order of the Secretary aside, the court in addition to being required to find irreparable injury, as required by the Urgent Deficiencies Act, and to take security against the improvident or wrongful issuance of an order restraining the enforcement of the Secretary's order *pendente lite*, such interlocutory order should also be conditioned upon the giving of security, by impounding or otherwise, to conform the charges collected under the protection of such interlocutory order to those which the Secretary might find to have been reasonable during the pendency of the litigation, if his order should be set aside, if the authority so conferred upon him was seasonably exercised.

Each of these provisions, except the first, would be essential to any legislative scheme having for its purpose the continued and continuing effectuation of the requirement that all rates should be just and reasonable both to the market agencies and to the rate-payers. The first, while not essential for this purpose, would require all rates at all times to be those established or approved by the Secretary, although the adoption of this provision without protection to the market agencies if the Secretary suspended or refused to approve reasonable advanced rates, would unless accompanied by the other provisions described, fail to bring about a continued and continuing conformity between the rates collected and the substantive requirements

¹⁷It must be borne in mind that in all such cases the contention of the market agency necessarily must be that the rates then in effect *are* and will be for the future unreasonable.

of Section 1: Congress did not see fit to implement the substantive provisions of the Act by such procedural mechanisms.

The legislative policy of the Act, therefore, was this: That the rates to be charged must be covered by tariffs on file with the Secretary; that these rates when voluntarily filed by the market agencies—as were the rates charged during the pendency of this case—were not only the only legal rates, but presumptively reasonable (*Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197; *Louisville & Nashville R. R. v. Maxwell*, 237 U. S. 94, 97-98; *Dayton Iron Co. v. Cincinnati Ry.*, 239 U. S. 446, 451); that such rates could be neither raised nor lowered except in conformity with the procedural sections of the Act; that the Secretary could make rates only for the future and then only *after* hearing; and that reparation or award for damages by reason of the exaction of an unreasonable rate could be made only upon a complaint, followed by an award of reparation which, when made, would be *prima facie* evidence only that an unreasonable charge had been exacted. Only by resort to the so-called procedural sections of the Act were the substantive requirements of Section 305 to be effectuated, whether invoked by the shipper on complaint either as to the past or as to the future, by the Secretary in the exercise of his authority to make rates for the future only in proceedings instituted upon his own motion, or by the market agencies for the purpose of having the rates raised to conform to the statutory standard.

The argument that the legislative policy of Congress will be frustrated unless the Court supplements these procedural provisions by the creation of rights and remedies

not provided for, and contrary to those contained in the Act, is thus based upon a complete misconception of the legislative policy of Congress as embodied in the Act and of the essential and intended relationship between the requirements of Section 305 and the so-called procedural provisions by which and only by which charges made either for the past or the future are to be brought into conformity with the requirements of such section.

3. The Government's complete misconception of the legislative policy of Congress and of the relation between the substantive and so-called procedural provisions of the Act is further demonstrated by a consideration of the Interstate Commerce Act and its legislative and judicial history over a period of more than fifty years, upon which Act the Packers and Stock Yards Act was modelled.

The Interstate Commerce Act was passed in 1887. The Packers and Stock Yards Act enacted in 1921 was patterned after it. Indeed, most, if not all of the provisions of the former pertinent to the issues in this case were lifted bodily and verbatim from the Interstate Commerce Act. The Packers and Stock Yards Act was thus modelled upon the Interstate Commerce Act as it existed in 1921. In the thirty-three intervening years the latter had been amended a number of times in important respects. Many of these amendments had to do with substantive rights and duties and correspondingly increased the powers of the Commission. Other equally important amendments had to do with the "procedural mechanism" by which the substantive requirements of the Act in its original form were to be effectuated. The legislative history of these amendments makes it unmistakably plain that in respect of that Act it

was from the beginning the purpose of Congress that its substantive requirements should be effectuated only by the means prescribed and subject to the limitations imposed by its procedural provisions, and in no other manner. The history of these amendments discloses that in adopting them Congress recognized that procedural deficiencies could be cured only by statute, and that where such deficiencies existed, its substantive provisions could be effectuated only by altering the "procedural mechanism" by statutory enactment.

For more than thirty years the Commission was the only Federal administrative agency having to do with the rates of public utilities. Its members were experts, students as well as administrators of administrative law. They were at all times keenly conscious of the substantive requirements of the Act, and equally keen to observe deficiencies in the procedural mechanism by which it was to be effectuated, whenever such appeared. Upon the appearance of such deficiencies they invariably and promptly directed them to the attention of Congress and recommended appropriate legislation. It is not without significance that throughout the fifty years of its existence the Commission has recommended no amendment either in the Act itself or in the statutes governing or limiting the powers of the courts in respect thereto whereby, if an order of the Commission is set aside, either the Commission or the court would be empowered, acting separately or together, to determine what were the reasonable rates which should have been charged during the pendency of such litigation. Yet the situation which now prompts the Government to suggest that the Court should implement the procedural mechanism of the

Act through the provision of additional or substitute remedies is by no means novel. It is a situation which has been present in every case where a rate-making order of the Interstate Commerce Commission has been set aside since the Commission was empowered to fix maximum rates in 1906. Nor has Congress, conscious as it must have been from the beginning that a situation such as is now presented would inevitably arise whenever such an order of the Commission was set aside, and conscious as it must have been that in the flood of litigation which has occurred during the existence of the Act many orders have been set aside, provided by statute the "procedural mechanism" which, in the opinion of the Government in this case, should be provided. Nor, so far as our investigation goes, has any bill looking to the provision of such additional or substitute remedies ever been offered in Congress.

It was from this Act that the Packers and Stock Yards Act was patterned, indeed almost copied. (See Report of the House Committee on Agriculture, 67th Cong., 1st Sess., H. Rep. 77, p. 12.) If in determining the legislative purpose of Congress resort is to be had to extrinsic aid, the legislative history of the Interstate Commerce Act affords the best source from which that legislative purpose may be determined. The legislative history of that Act discloses unmistakably that the scheme of legislation embodied therein was not one by which it was contemplated that the substantive requirements of the Act should be either self-executing or operative at all times and under all circumstances, but that such substantive requirements should be effectuated only through and by means of the procedural mechanism provided for that purpose.

A. FAILURE OF CONGRESS TO ACT FOR TEN YEARS AFTER THIS COURT HAD HELD IN *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, THAT THE COMMISSION WAS WITHOUT POWER TO BRING RATES FOR THE FUTURE INTO CONFORMITY WITH THE SUBSTANTIVE REQUIREMENTS OF SECTION 1.

The most notable amendment having to do with the manner by which the substantive requirements of the law should be effectuated was the Hepburn Amendment of 1906, conferring upon the Commission the power to fix maximum rates for the future.

The Interstate Commerce Act, as originally enacted and now, like the Packers and Stock Yards Act, contains the substantive requirement that all rates shall be just and reasonable and prohibits and declares unlawful the exaction of an unreasonable rate. (Sec. 1, 24 Stat. 379.) The Act further required the carriers to publish and observe the charges named in schedules to be filed with the Commission (Sec. 6, *Ibid.* 380). It empowered the Commission to award damages for the exaction of an unreasonable rate (Sec. 8, *Ibid.* 382), upon complaint, or in an inquiry instituted on its own motion (Sec. 9, *Ibid.* 382, Sec. 13, *Ibid.* 383-384). It further authorized the Commission if, upon investigation, it found that a carrier had been guilty of a violation of the Act, to order it to cease and desist therefrom (Sec. 15, *Ibid.* 384). By amendment to Sec. 12 enacted in 1889, the Commission was "authorized and required to execute and enforce the provisions of this act" (25 Stat. 858, Sec. 3). By Sec. 16 of the original Act (24 Stat. 384-385) orders of the Commission were enforceable by mandamus. No power to establish reasonable rates for the future was expressly delegated.

In *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, the Commission upon complaint had found the carrier's rates unreasonably high and had ordered it to cease and desist from charging for the future rates higher than those found by the Commission to be reasonable. The Commission thus sought by indirection to prescribe rates for the future. It brought an action to enforce its order. The court below dismissed the bill and this Court in answer to a certified question held that the order was beyond the power of the Commission.

The argument advanced was substantially that now made, viz., that the substantive requirements of the Act would be frustrated unless the Act should be so construed as to authorize the Commission to enter and enforce the challenged order. Emphasis was placed both upon the power conferred to enter a cease and desist order and upon the affirmative duty to "execute and enforce the provisions" of the Act, a provision wholly lacking in the Packers and Stock Yards Act, by which the Secretary's powers and duties are carefully defined and limited. The Court declined to interpret an Act expressly directing the Commission to execute and enforce its provisions, as conferring upon the Commission any power to "evolve" procedural mechanism in furtherance of its cardinal requirement that "all rates shall be just and reasonable" (Govt. Brief, p. 23) and thus by judicial interpretation to "mold the statute to effectuate substantive justice" (Govt. Brief, p. 20). No suggestion was made in that case that the court itself was possessed of authority to do either of these things.

Had the decision been the other way, it would not be of assistance to the contention the Government now makes.

In that case the power to determine what would be a reasonable rate for the future was neither expressly granted nor expressly withheld. The Court held that not having been expressly granted it was not to be implied, despite the broad powers conferred upon the Commission and the effect of its denial upon the policy declared in Section 1. In this case power to determine a reasonable rate for the past in proceedings instituted by the Secretary on his own motion has been expressly withheld.

But as bearing upon the question now presented—*i.e.*, what is and has been the legislative policy of Congress—the case is significant chiefly not by reason of the decision rendered but on account of what followed.

The decision was rendered on May 24, 1897. In its annual report to Congress of December 6 of that year, the Commission, commenting upon this decision, recommended that the Commission be empowered to establish maximum rates for the future, pointing out that without such power the substantive requirements of Sec. 1 could not be effectuated (Eleventh Annual Report of the Interstate Commerce Commission, 1897, pp. 15-22).

These recommendations were renewed from year to year (Annual Reports of the Interstate Commerce Commission for the years 1898-1905).¹⁸

In its Sixteenth Annual Report (1902), the Commission, commenting upon the fact that the Act had then been in effect for nearly 16 years, again pointed out that the sub-

¹⁸Twelfth Annual Report (1898), p. 27; Thirteenth Annual Report (1899), pp. 5-8; Fourteenth Annual Report (1900), p. 5; Fifteenth Annual Report (1901), pp. 5-6; Sixteenth Annual Report (1902), pp. 6-7; Seventeenth Annual Report (1903), pp. 11-13; Eighteenth Annual Report (1904), pp. 5-10; Nineteenth Annual Report (1905), p. 5.

stantive requirements of Sec. 1 could not be effectuated unless the Commission were empowered to make rates for the future (pp. 6-7).

It was not until nearly ten years after the decision in *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, that Congress, through the passage of the Hepburn Amendments in 1906, conferred this power upon the Commission. Whether it is now believed that *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.* was rightly or wrongly decided, the inaction of Congress for a period of ten years thereafter would seem to be a complete answer to the contention that the substantive requirement that all rates should be just and reasonable was intended by Congress to be effectuated in any manner except that specifically prescribed and subject to the limitations imposed by Congress upon the exercise of the Commission's powers as contained in the Act itself.

The argument that Congress intended to effectuate the substantive requirements of Section 1 by resort to the power of the Commission to "execute and enforce" the provisions of the Act by the entry of cease and desist orders enforceable in mandamus proceedings was not wholly without substance. Had the Congress been of the opinion that such was its intent, it would without doubt have promptly amended the Act so as to provide the necessary procedural mechanism for the accomplishment of its purpose. Instead it did nothing for ten years, although repeatedly warned by the Commission that by reason of its inaction the Commission was unable to effectuate the substantive requirements of that section. As said by the Commission in its Twelfth Annual Report (1898), page 27:

"Without authority to determine and order a maximum rate after due hearing and investigation, the Commission cannot execute the provision in the first section of the law requiring reasonable rates."

To similar effect is the language of the Commission in each of its Reports between the date of the decision and the Hepburn Amendments.

In *Arizona Grocery Company v. Atchison Ry. Co.*, 284 U. S. 370, the Court held that under the Interstate Commerce Act, as it now stands, a shipper was not entitled to reparation if the carrier's rate was as low or lower than one previously prescribed by the Commission as reasonable, even though such rate might in the meantime have become unreasonably high. The argument of the Grocery Company in that case is thus summarized in the opinion of the Court (pp. 389-390):

"The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to reexamine the fairness of rates prescribed, and will put an unbearable burden upon that body."

Counsel for the Grocery Company might have added, in the language of the Government in this case, that if the arguments of the Railway Company prevailed, as they did, the substantive requirements of Section 1 could not be effectuated by reason of the absence of appropriate "procedural mechanism" whereby reparation should be awarded for the exaction of an unreasonable rate, the Commission having found that the rate established originally by it had become unreasonably high. The Court answering the argument of the Grocery Company said:

"If this is so, it results from the new policy declared by the Congress, which, in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier. But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate" (p. 390).

It thus appears that even under the present law rates in effect at a given time are largely carrier-made rates, which may or may not conform to the requirements of Section 1, but which may be brought into harmony therewith as to the future only through the establishment by the Commission of a rate to be "thereafter observed", and for the past in reparation proceedings brought in behalf of that limited number of shippers who choose to institute them. This was all the more true under the statute as originally enacted, and particularly during the period intervening between the decision in *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, and the Hepburn Amendments.

This Court having held that the original Act did not confer upon the Commission any rate-making power, the principal "procedural mechanism" remaining in the original Act was that requiring the carrier to file and observe its rates, leaving it to the judgment of the carrier to determine whether they conformed to the requirements of the section, subject only to the complaint of those shippers (relatively few in number as the Annual Reports of the Com-

mission during that period show) who might invoke the reparation provision of the Act. This must have been obvious to Congress. If not, it was repeatedly pointed out to it by the Reports of the Commission, yet Congress chose for ten years to "subordinate" the substantive requirements of Section 1 to the procedural mechanism of the Act, and by so doing to rely largely, although not entirely, upon the carriers to bring their rates into conformity with the requirements of Section 1, without adequate remedy either through action by the Commission or, in large measure, by shippers.

B. FAILURE TO CONFER UPON THE COMMISSION POWER TO SUSPEND ADVANCES IN RATES UNTIL 1910.

The Act, originally and even as amended in 1906, left the carrier free to advance rates at will so long as the advance was published and filed. By the exercise of this power rates might be thrown out of harmony with the substantive requirements of Section 1 and remain so until brought into harmony therewith by subsequent action of the Commission after the delay incident to hearing and possibly to ensuing litigation. In its Twenty-first Annual Report (1907), following almost immediately after the amendments of 1906, the Commission said (p. 6):

"The main purpose of that legislation (the amendments of 1906) was to provide more adequate means for the enforcement of rights and duties already declared to exist. The vital principle of a right is found in the obligation to respect it. Without remedial procedure the declaratory portion of any law is little more than the statutory expression of a sentiment, but when efficient machinery for securing ob-

servance is provided the performance of definite duties and the recognition of definite rights may be expected to follow in ordinary conduct without resort to litigation. That this is true in regard to the amended act, and to an extent not generally appreciated, is confidently asserted."

Accordingly, it recommended that it be empowered to suspend advances in rates pending determination of their reasonableness after hearing (p. 8, pp. 9-10).

The Commission thus recognized, as had Congress by its inaction for a period of ten years following the decision in the case of *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, that the substantive requirements of the Act could be effectuated only through resort to the procedural provisions, which could be supplied only by Congress.

The Commission renewed its recommendation in its Annual Reports for the years 1908 (pp. 10-11) and 1909 (pp. 6-7). Congress did not act upon these recommendations until 1910, when by the Mann-Elkins Act the Commission was empowered to suspend advances in rates for an initial period of 120 days and a subsequent period of six months further (36 Stat. 552, Sec. 12). Only by an amendment of the so-called procedural sections of the Act was the statute thus brought more nearly into conformity with the purposes and requirements of Section 1 and then not until three years after the deficiency in the mechanism provided to implement the requirements had been brought to the attention of the Congress.

While adoption of the proposed amendment was thus designed to bring the carrier's charges into conformity with the requirements of Section 1 where it was charged that the

advanced rate would be unreasonably high, Congress did not see fit to insure their conformity to its requirements if the existing rate was unreasonably low and the proposed advance just and reasonable, by providing any means by which the carrier would be protected during the period of suspension in the receipt of a rate just and reasonable to it—and thus conforming to the requirements of Section 1—if at the conclusion of the suspension period the advanced rate should be sustained as reasonable, either through impounding the difference during suspension or through providing any remedy to the carrier at the termination of the suspension period as provided for in the New York Public Service Law. Yet if the legislative policy of Congress were—as the Government insists it is under the Packers and Stock Yards Act—to provide for a scheme of regulation under which all rates at all times should conform to the requirements of Section 1, some such provision was obviously necessary. The carrier, however, was thus left remediless in the event the advanced rate turned out to be reasonable, solely by failure of Congress to enact suitable procedural provisions to insure to the carrier, during the suspension period, the receipt of a rate conforming to the substantive requirements of Section 1, just as by having previously failed to confer upon the Commission the power to suspend rates it had left shippers remediless (except through resort to reparation proceedings by those who chose to resort thereto) whenever the carrier exercised its previous right without restraint to advance its rates to such figure as it saw fit.¹⁹

¹⁹By the Transportation Act (41 Stat. 456) the Commission's power to suspend advances in rates was cut down from a total suspension period of ten months to a total suspension

C. CORRECTION OF THE PROCEDURAL PROVISIONS BY MAKING IT CLEAR THAT THE COMMISSION HAD POWER TO MAKE RATES FOR THE FUTURE IN PROCEEDINGS INSTITUTED ON ITS OWN MOTION AS WELL AS BY COMPLAINT.

Section 13 of the original Act provided that the Commission itself might "institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made" (24 Stat. 384). Section 15 provided that "in any case in which an investigation shall

period of five months, by reducing the period of the second suspension which might be ordered from six months to 30 days. At the same time, the statute required that if the suspension proceeding had not been concluded at the expiration of the first period of 120 days or of the second period of 30 days, the Commission by order might "require the interested carrier or carriers to keep account in detail of all amounts paid by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund with interest to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified." Congress thus in part recognized the injustice of requiring carriers to maintain old and lower rates in effect pending the determination of the suspension proceeding, by cutting the total period thereof down, but provided no means by which the carrier could be protected against the receipt of unreasonably low charges for the five months during which the rates could be suspended. It did, however, confer upon the Commission power to protect the shipper against the exaction of an unreasonable rate for a longer period by the provisions quoted above. Here again Congress, in the exercise of its legislative power and by the procedural provisions adopted, made it again evident that the substantive requirements of Section 1 were to be effectuated only to the extent provided for in the so-called procedural provisions of the Act.

be made by said Commission" it might enter an appropriate order (24 Stat. 384).

The power to establish the maximum rate or rates "to be thereafter observed" was conferred, as previously stated, by the Hepburn Amendments of 1906. Those amendments made no change in Section 13. Section 15 was amended, however, so as to read (34 Stat. 589):

"That the Commission is authorized and empowered * * * whenever, after full hearing *upon a complaint* made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier * * * are unjust or unreasonable * * * to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged."

The Hepburn Amendments of 1906, literally construed, would have confined the exercise of the Commission's rate-making power to cases instituted by complaint. Accordingly in its Twenty-third Annual Report to Congress (1909) the Commission recommended that Section 15 be amended so as to confer upon the Commission unmistakable authority to exercise its rate-making power in proceedings instituted upon its own motion as well as upon complaint (p. 8).

This recommendation was effectuated by an appropriate amendment of Section 15 in the following year, 1910 (36 Stat. 551, Sec. 12). In this case the Congress acted promptly, doubtless because the omission in Section 15, as amended in 1906, was an oversight. The important thing is

that Congress, like the Commission, recognized that, under the whole scheme of the Act, its substantive requirements could be effectuated only through its procedural provisions, which were consequently required to be clearly expressed.

D. FAILURE TO REMOVE THE TWO-YEAR LIMITATION ON THE COMMISSION'S RATE-MAKING ORDERS (IMPOSED IN 1906) UNTIL 1920.

Section 15 of the Act as amended in 1906, at which time the Commission was first empowered to make rates for the future, provided:

"All orders of the Commission, except orders for the payment of money, * * * shall continue in force for such period of time not exceeding two years as shall be prescribed in the order of the Commission" (34 Stat. 589).

At the expiration of two years the carrier was thus free to advance the rate prescribed by the Commission's order to any figure it saw fit. The carrier was thus empowered to establish a rate higher than that conforming to the requirements of Section 1 and to exact the same until displaced by a subsequent order of the Commission. This deficiency in the "procedural mechanism" was not cured for fourteen years or until 1920 although it had been called to the attention of Congress four years earlier in the Commission's Thirteenth Annual Report (1916), page 77:

"The orders of the Commission are binding for a maximum period of two years. It frequently results that discriminatory or unreasonable rate situations considered in an investigation extending over a substantial period of time and involving a large

amount of work and expense, and which are corrected for a period of two years by an order, are reestablished immediately upon the expiration of the two years, thus necessitating another equally or more exhaustive investigation."

* * * * *

"These and other contributing causes lead to the result that in this respect and to this extent the present system or plan of regulation resolves itself largely into a sort of continuous moving around in a circle. * * *"

By the Transportation Act, 1920 (Sec. 418, 41 Stat. 485, amending Section 15 of the Interstate Commerce Act) Congress removed this limitation by providing that:

"all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Until the so-called procedural provisions of the Act were thus amended the substantive requirements of Section 1 might be frustrated by an advance in the rate after the expiration of the Commission's order.

In curing this procedural defect, however, the Congress created another not yet cured. As a result of the amendment the carrier was required to go on charging the Commission-made rate—although in the meantime it may have become unreasonable—until modified by a

subsequent order of the Commission, which in the normal course of things could only be had after conduct of further proceedings by the Commission, the duration of which would depend upon the nature and scope of the rates thus again brought before it for review. In any general rate case or one of wide scope, these were certain to be protracted. Yet Congress made no provision by which the carrier would be protected in its right to a reasonable charge during the pendency of such proceedings, or of any subsequent proceedings in court, by the impounding of the difference between the Commission-made rate and the proposed advance, if it should turn out that the rate previously established by the Commission had become unreasonably low and hence failed to conform to the substantive requirements of Section 1.

E. FAILURE TO CONFER UPON THE COMMISSION POWER TO MAKE MINIMUM RATES UNTIL 1920.

Section 3 of the original Act provided as follows:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Enforcement of the substantive requirements of this provision are as essential to the effectuation of the policies

of the Act as enforcement of the substantive requirements of Section 1. Indeed, according to many students of the transportation problem, the relation of rates between competitors or competing sources of supply is as important, if not more so, to shippers as the measure of the rate charged.

As early as 1898 the Commission recommended that it be empowered to fix minimum rates, saying in its Twelfth Annual Report (1898):

"the power to prescribe a *minimum* as well as a maximum rate is necessary to enforce the prohibition against undue preferences as between localities in cases where the places involved are not served by the same line" (p. 27).

The Congress failed to act upon it until 1920, when by the Transportation Act of that year (41 Stat. 485) it conferred upon the Commission power to establish minimum as well as maximum rates by appropriate amendment of Section 15.

F. REDUCTION OF TIME WITHIN WHICH REPARATION CLAIMS MIGHT BE FILED.

Prior to the Hepburn Amendments of 1906, no period of limitations for the filing of complaints by individual shippers for an award of damages for the exaction of an unreasonable rate was provided for in the Act. Since that time, all such complaints are required to be filed "within two years from the time the cause of action accrues" (Section 16 (2), Interstate Commerce Act, as amended by Section 5 of Hepburn Act, 34 Stat. 590). By thus amending the "procedural mechanism" the Congress reduced the period

within which rates which failed to conform to the requirement of Section 1 could be brought into harmony therewith as to past transactions through reparation proceedings.

It is not without interest that in its Forty-fourth Annual Report (1930) the Commission recommended that the period within which complaints seeking reparation might be filed with the Commission should be further reduced to ninety days, the period provided in the Packers and Stock Yards Act. It renewed this recommendation in its Forty-fifth (1931) and Forty-sixth (1932) Annual Reports. Congress has taken no action to carry these recommendations into effect.

G. WITHDRAWAL FROM THE COMMISSION OF THE POWER TO AWARD REPARATION IN PROCEEDINGS INSTITUTED BY IT ON ITS OWN MOTION.

The original Act made no distinction between orders which might be issued by the Commission in proceedings instituted under Section 13 by complaint or on the Commission's own motion. By the Mann-Elkins Act (Sec. 11, 36 Stat. 551) Section 13 was amended so as to provide that in proceedings instituted on the Commission's own motion it should be empowered

"to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, *excepting orders for the payment of money.*"

Congress by a contraction of the "procedural mechanism" made it more difficult to bring rates on past transactions into conformity with the requirements of Section 1.

H. CONCLUSION.

The legislative history of the Interstate Commerce Act, like the provisions of the Packers and Stock Yards Act hereinafore reviewed, thus lends no support to the Government's major premise, namely, that the Congress contemplated that this Court should have the power "to mold the statute" so as to effectuate the substantive requirements of the Act or to "evolve procedural mechanism" for that purpose by the establishment of rights and the provision of extraordinary remedies to that end. On the contrary, the legislative history of the Act, the recommendations of the Commission made from time to time in respect thereto, and the action or inaction of Congress in respect thereof make it plain that the Congress, as appears upon the face both of the Interstate Commerce Act and of the Packers and Stock Yards Act, intended that its so-called substantive requirements should be effectuated only in the manner prescribed and within the limitations imposed by its procedural provisions.

4. The failure of the Commission to recommend or of the Congress to provide for any such supplementary remedy as now proposed during the fifty years of experience with the Interstate Commerce Act from which the Packers and Stock Yards Act was copied, is persuasive, if not conclusive, that none such was intended.

The Interstate Commerce Act has been in operation for more than fifty years. The Commission has been empow-

ered to establish rates for the future for more than three years. Throughout this period it has been the specific duty of the Commission to make to Congress annually "such recommendations as to additional legislation as the Commission may deem necessary" (Section 21).

During this period innumerable suits have been brought to set aside the Commission's orders. In some cases its orders have been sustained and in others set aside. In some cases its orders have been set aside by the District Courts but sustained by this Court on appeal. In some cases its orders have been sustained by the District Courts but set aside on appeal. In some cases injunctions *pendente lite* have been issued, in others not. A review of the reports of the Interstate Commerce Commission will disclose that in proceedings involving a whole scheme of rates as in this proceeding, there is a substantial lapse of time between the institution of a proceeding brought for that purpose and its final determination by the Commission. It is perfectly obvious that in such proceedings before the Commission, if the rates be reduced at the end of it, the rates charged during its pendency, and perhaps prior thereto, will have been unreasonably high for substantial periods of time. It is equally obvious that if such proceedings, whether arising under the exercise of the Commission's suspension power or otherwise, result in an advance of rates, the rates charged during its pendency, and perhaps prior thereto, have in all probability been unreasonably low and have hence lacked conformity with the substantive requirements of Section 1. It is equally obvious that if a Commission order reducing rates has been suspended *pendente lite*, either by the court or by voluntary action of the Commission, as frequently has

pens, and such order is ultimately sustained, unreasonable rates will have been exacted from the shippers in the interim. It is equally obvious that if the order of the Commission shall be set aside, but not suspended *pendente lite* either by temporary injunction or voluntary action upon the part of the Commission, the carrier will have been denied the right to the receipt of a reasonable charge in the interim. It is equally obvious that under the suspension and other provisions of the Act, if the carrier is required to resort to the courts in order to set aside an order of the Commission forbidding an advance, and prevails in such suit, it will have been required, under compulsion of law, to forego its right to the exaction of a reasonable rate during the pendency of the proceedings both before the Commission and in court.

Yet in all this period the Commission has made no recommendation to Congress that the law be amended so as to bring the rates charged, either during the pendency of proceedings before the Commission or of suits in court to review its orders, into conformity with the substantive requirements of Section 1, by conferring additional power either upon the Commission or upon the courts, or by impounding funds to be held pending the determination either of the proceeding before the Commission or of suits brought in court to test the validity of the Commission's orders. Nor so far as we are aware has any such proposal been made by any one else, either in or out of Congress. Yet the situation presented in this case has arisen with recurring frequency.

VI

THE ANALOGY TO COURT PROCEEDINGS, FAR FROM SUPPORTING THE GOVERNMENT'S CONTENTIONS, SUPPORTS THOSE OF THE APPELLEES.

Whenever a court finds that an order of the Secretary or of any administrative tribunal is void, its function is at an end. It may not in any way control the further action of the Secretary. What he may do or not do thereafter depends, first, upon the statute, and second, upon his own volition. The analogy to a new trial in judicial proceedings breaks down at every point.

Moreover, on a new trial a court may not render any judgment or enter any order which goes beyond the issues in the case in which such new trial is granted or which is beyond its jurisdiction. If the pleadings remain the same and the proof the same, it may enter the same judgment over again, but not, as here sought, *nunc pro tunc*. And certainly it may not determine questions not at issue and which, under the statutory limitation placed upon its jurisdiction, it has no power to determine. Under the Packers and Stock Yards Act the Secretary may make an order fixing rates for the future only. In a proceeding instituted on his own motion he may not enter an award of reparation or make any determination of the reasonableness of charges collected while the case was pending before him. Under the new trial analogy carried to the extreme the Secretary may enter the same kind of an order and make the same kind of determination that he could have entered had he proceeded properly in the first place and no other. That is the most a court could do on a new trial. But he could not then or now

award reparation or determine the reasonableness of the charges collected during the pendency of the proceedings, or enter a *nunc pro tunc* order fixing rates for the future. The statute expressly forbids both: the first, because he may not make an order for the payment of money, the second, because an order fixing rates for the future may be made only after full hearing, and on June 14, 1933 there had been none.

When a new trial is ordered in court the judgment is entered as of the date of its rendition—not as of the date of the judgment previously set aside. But this kind of a judgment or order—the only kind a court may enter—advances the Government nowhere.²⁰

In an action at law the judgment, whenever entered, customarily operates wholly on past transactions, although operative as a judgment only after entry. This is because it is based upon a cause of action growing out of such transactions and antedating the complaint. If the cause of action

²⁰When a plaintiff in an ordinary lawsuit loses the benefit of a judgment by the procedural errors of the trial court, which frequently he is unable to prevent, it would hardly occur to him to insist, despite the lack of fault on his part, that a judgment granted to him after a new trial might be similar to the reversed judgment and therefore ought to be dated back to the time when the latter was entered. It would not, we submit, occur to the Secretary in this case to make such a proposal if it were not for the fact that he is both prosecutor and judge and in the latter capacity realizes that he possesses the power to make his subsequent order identical with his order of June 14, 1933, invalidated by this Court. This is particularly true in view of the fact that no rule of law appears to exist to govern his action in fixing rates for personal services. He has in fact already publicly announced (prior to any reconsideration of the case) that he intends to do so, having said that the impounded funds "rightly belonged to the farmer" (Govt. Brief, p. 96).

is a continuing one, damages may sometimes be awarded up to the time of judgment, but usually there is no such question. Similarly, in a reparation proceeding before the Secretary the order entered relates to past transactions occurring prior to the filing of the complaint. The rates charged to have been unreasonable for the past may continue to be unreasonable during the pendency of the proceeding. No reparation for such period may be recovered, however, except upon the filing of new or supplemental complaints.²¹ This because the statute so requires. Here is another case where the procedural provisions fail to give continuing effect to the hortatory requirements of Section 305. Yet it will scarcely be contended that this Court should implement the statute further for this purpose by "evolving" the necessary "procedural mechanism" which Congress has failed to provide. Nor in a new trial in an action at law could the plaintiff recover on new causes of action, which had arisen during the appeal, although of the same character and de-

²¹The statement is made and constantly reiterated by appellants that decision against them will result in imposing as a penalty for a procedural error an "irretrievable reversal on the merits"; or as otherwise stated, it cannot be argued "that because procedural rights had been denied therefore substantive rights were determined". Only by confusing a proceeding leading to a quasi-legislative rate-fixing order with a judicial proceeding for the determination of the legal effect of operative events in the past can such a specious argument be made in this case. Until a quasi-legislative rate-fixing order is validly made "after full hearing" no event legally operative to disturb the *status quo*, that is, the right of appellees to charge their legally filed tariff rates, has taken place. The proceeding does not concern itself with any cause of action. The act is legislative, not judicial. *Louisville and Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 307; *State Commission v. Wichita Gas Co.*, 290 U. S. 561, 569; *The Chicago Junction Case*, 264 U. S. 258, 265.

pendent upon the same questions of law, except by amendment, and then only if not barred in the interim.

And so the analogy of new trials in actions at law gets the Government nowhere because the proceeding before the Secretary has none of the incidents of an action at law, since in such a proceeding he may act only upon the rates to be thereafter charged, not from the date when the proceeding was instituted, but from and after the date of the order and then only after full hearing.

In a new trial in an injunction case, the injunctive relief, of course, operates on the future conduct of the parties only. No one ever heard of a *nunc pro tunc* injunction. Where pleadings and proof warrant, damages for the past may be assessed in an injunction suit, because it is within the judicial power to give complete relief in one proceeding. The exercise of this power does not depend upon whether there has been a previous decree, reversed on appeal and subsequently reentered at the end of a new trial. Equity's jurisdiction to assess damages attached when the suit was first filed and may run back to such period in the past as the facts justify. But the Secretary, in a proceeding instituted on his own motion, may not award damages for any period. Congress not only failed to confer any such authority upon him, but expressly withheld it from him.

And so if we follow the analogy to the end, it turns against the Government. On a new trial a court may enter only such judgment as it could have entered in the first place on the issues submitted by the pleadings and subject to such jurisdictional limitation, if any, as may have been imposed upon it by statute. So with the Secretary, when an order of his has been set aside, he may reopen the proceeding in which made but may enter only such order as

is permissible under the issues presented in that proceeding and subject to its jurisdictional limitation. These he may not disregard because litigation has intervened, any more than a court may disregard similar limitations because a new trial has been ordered because of its previous error, procedural or otherwise. In other words, the jurisdiction of neither may be enlarged because of its own previous error.

Nor could an appellate court, having set aside an erroneous judgment or decree and sent the case back for a new trial, direct the trial court to exercise on the new trial a jurisdiction expressly withheld from it by statute. But that is precisely what the Government is urging may be done in this case.

VII

THE AUTHORITIES CITED BY APPELLANTS DO NOT SUPPORT THEIR POSITION.

The authority most strongly relied on by appellants is *Atlantic Coast Line v. Florida*, 295 U. S. 301. The discussion of this case is followed with a discussion of two New York intermediate court cases, *New York Edison Co. v. Maltbie*, 244 App. Div. 436 (3rd Dept.); *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. 74 (3rd Dept.). The argument concludes with a discussion of *habeas corpus* cases in immigration proceedings. *Mahler v. Eby*, 264 U. S. 32; and *Tod v. Waldman*, 266 U. S. 113.

(a) The New York Intermediate Court Cases.

Of these five cases the only ones at all analogous to our situation are the two New York cases decided in one of the

several departments of the intermediate court in New York. The orders in these cases with relation to the impounded funds were made, as is expressly noted by the court, in the exercise of its discretion. There is little or no reasoning in the opinions which is of any value to this Court. The scheme of the New York Public Service Commission Law is very different from that of the Packers and Stock Yards Act of 1921, particularly the provisions in connection with reparations (Sec. 113) and for "immediate" fixing of temporary rates (Secs. 72, 114). The procedure in the State of New York for attacking public utility rate orders is by *certiorari* (N. Y. Civil Practice Act, Secs. 1304-1305), and differs entirely from the procedure of the Urgent Deficiencies Act.

For these reasons it would be inappropriate and of no substantial assistance to the Court for us to attempt to determine whether under New York law these cases were rightly decided. A few observations may, however, properly be made. Perhaps the most striking difference between the New York Public Service Commission Law and the Packers and Stock Yards Act is that in the former no reparations procedure by private suits is provided for. If a public utility company increases its rates the Public Service Commission may cause it as security for reparations in the event the order is finally upheld to give security bond or impounding of the difference between the old rates and the new while it determines the reasonableness of the new rates (Sec. 113). In the *New York Edison* case special or equity term of the Supreme Court stayed the commission's order pending judicial determination of its validity on condition that the company would give such security to repay its customers in the event the Commis-

sion's order was finally upheld. In the *Brooklyn Union Gas* case the Public Service Commission (apparently without statutory authority therefor because no increase in rate was involved) stayed its own order upon a similar condition.

In the New York Public Service Law the amendments recently inserted therein for the fixing of temporary rates provide (Sec. 72) that the Commission "upon such terms, conditions or safeguards as it deems proper may authorize an *immediate* reasonable temporary increase or decrease in such price (of gas or electricity charged by a public service corporation) pending a final determination of the price to be thereafter charged by such person or corporation". Thus, unlike the Packers and Stock Yards Act, the legislation indicates a purpose to have an *immediately* effective temporary rate. It is further provided (Sec. 114) that "the Commission may in any such proceeding brought either on its own motion or upon complaint, upon notice and after hearing, if it be of the opinion that the public interest so requires, *immediately fix*, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding". That is something which Congress may ultimately want to do in connection with the Packers and Stock Yards Act, but the difficulty with appellants' position is that it has not yet done it.

Another vital consideration is that the New York courts are not bound by the constitutional restrictions in Article III of and Amendment VII to the Federal Constitution with respect to judicial power being reposed in the courts and the right to trial by jury. This is highly important, of course, where the question of the Public Service

Commission's power to award reparation by means of impounding orders or bonds, and upon its own motion, is under consideration.

(b) The Immigration Cases.

The two immigration cases cited by the Government, *Mahler v. Eby*, 264 U. S. 34, and *Tod v. Waldman*, 266 U. S. 113, are not in point. The enforcement of the immigration laws is, of course, traditionally a function of the Executive Department and the exigencies of due process are far less exacting in such a field which is so intimately associated with the prerogatives of sovereignty. In the *Mahler* case the missing finding of fact essential to the validity of the warrant of deportation was so obviously inherent in the facts found that a further hearing would be necessary only as a formality. The aliens had been convicted of crime, but the Secretary of Labor had failed to find that they were "undesirable residents of the United States": To permit these aliens under such circumstances to escape, although the Secretary had the full right to rearrest them and conduct another proceeding for their deportation, would, of course, have been foolish. No order made in that further proceeding would be "*nunc pro tunc*" as is proposed and as is essential to the Government's position in our case. An order dated when made would be wholly sufficient to secure the deportation of the immigrant. The order of this Court in the *habeas corpus* proceedings providing for the retention in custody of the immigrant until the Secretary of Labor should make the new finding was analogous to the order of the statutory court in our case requiring the deposit of security to await an event, that is, the decision of the Court whether the Secretary's

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order was valid. The Secretary himself well realizes the vital difference between the two cases because the only order he proposes to make is to be dated as of June 14, 1933.

In the *Tod* case the question concerned the right of immigrants to enter the country. It is, of course, obvious that they could not be given that right by any failure of the Secretary of Labor to accord them a "full and fair hearing". But in our case the market agencies had the clear pre-existing legal right to make the charges made under the filed tariffs in default of their being properly superseded by a validly made order of the Secretary. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197; *Louisville & Nashville R. R. v. Maxwell*, 237 U. S. 94, 97-98; *Dayton Iron Co. v. Cincinnati Ry.*, 239 U. S. 446, 451. Here again, just as in the *Mahler* case, the deportation order finally issued would have no retroactive effect. In other words, in our case everything depends upon the time when the order which the Secretary says he will make is entered and in the immigration cases nothing depends upon that. In neither our case nor the immigration cases are "the merits" concluded by any procedural mistake. In both situations the determination of "the merits" is merely postponed thereby.

(c) *The Atlantic Coast Line Case.*

Our opponents attempt to derive some comfort from the decision of this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301. We have already shown that that was a restitution case and that this is not (Point II, pp. 40, 41 *ante*), which clearly makes it inapplicable.

While appellants do not claim that the case is really in point, they would have us believe that the opinion of the majority in this five-to-four decision squints in their direction. We believe that it can be rather easily demonstrated that it does not even do that, and indeed expressly repudiates the basic assumptions of appellants' theory. It is certain, moreover, that appellants can derive no comfort from the minority opinion written by Mr. Justice Roberts, in which the Chief Justice and Justices Brandeis and Stone concurred.

In the *Atlantic Coast Line* case a schedule was established by the Interstate Commerce Commission to supersede intrastate railroad rates established by the Florida Railroad Commission, known as the Cummer Scale, since it was found that those rates unreasonably discriminated against interstate commerce. A bill to enjoin the order of the I. C. C. was dismissed by the statutory court, but its decree was reversed by this Court, without consideration of the evidence, upon the ground that the order of the Commission was not supported by appropriate findings (*Florida v. United States*, 282 U. S. 194). Thereafter, the Commission reopened its proceedings and upon new evidence and new findings entered another order setting aside the Cummer Scale. A bill to enjoin this order was likewise dismissed by the statutory court and its action was here affirmed (*Florida v. United States*, 292 U. S. 1).

Meanwhile, the shippers applied to the statutory court for restitution of the excess of the rates which they had paid over the rates established by the Cummer Scale while the original invalid order of the I. C. C. had been in effect. The motion for restitution was resisted, but the court awarded restitution measured by the difference between the

charges collected and the lawfully established rate in effect at the time of each shipment in question, referring to a special master the determination of the amount of restitution. Finding the Cummer Scale unreasonable and confiscatory, the master recommended, and the court adopted, an independent determination of what constituted reasonable charges during the period in question, and awarded restitution on that basis.

This Court determined, upon appeal, in a 5-4 decision, that no restitution should have been allowed. The view was taken that the court should not exercise its equitable power to award restitution under circumstances which would result in injustice and determined that the equities lay with the carrier, since the Cummer Scale was unreasonable and confiscatory and since the showing made by the shippers had not sustained their burden of establishing that the charges collected were unreasonable. In reaching this conclusion the Court took into consideration the findings of the I. C. C. upon the new hearing, but, definitely rejected the contention that it was bound thereby.

The minority of the Court (in an opinion written by Mr. Justice Roberts, in which the Chief Justice and Justices Brandeis and Stone concurred) maintained that restitution should have been awarded on the basis of the difference between the charges collected and the Cummer Scale, since the Cummer Scale constituted the lawful rates prescribed by the Florida Railroad Commission and could not be set aside by the court except in a suit brought specifically for that purpose. It was argued that to make an award upon any other basis would constitute an invasion of the rate-making authority of the State.

After the first decision of this Court, which held the order of the I. C. C. increasing its rates to be invalid; the Atlantic Coast Line made a motion in this Court for a stay of mandate or a direction to the statutory court to maintain the *status quo* until the I. C. C. could reopen its proceedings and make proper findings. While it was obvious that unless this should be done the Atlantic Coast Line would in the meantime, until the redetermination by the I. C. C., be compelled to charge the Cummer Scale and would be unable to collect from multitudinous shippers the difference between that scale and the higher rates fixed by the I. C. C., nevertheless this Court refused both the requests. We see no difference between that situation and this one, because the railroad was as much entitled to be protected against the necessity of bringing a multiplicity of suits as are the shippers in this case.

The fundamental basis of appellants' argument is that although the Secretary has not yet validly spoken he can hereafter do so with such retroactive effect as to require the statutory court to exert equitable powers to restore to shippers payments made by them to the market agencies and now constituting the fund impounded in court. The majority opinion in the *Atlantic Coast Line* case, however, expressly disavowed the existence of such a remedy and was confined to approval of inaction on the part of the statutory court. The minority opinion expressed the view that statutory rights cannot be defeated by the consideration of what the majority spoke of as equities even in a properly instituted restitution proceeding and even if the result is merely approval of inaction on the part of the court.

Appellants employ a strange technique in attempting to adapt these two diverse opinions to their purposes. That

technique consists in attempting to obtain the affirmative action of a court by combining what it conceives to be the "spirit" of the majority opinion (despite its clear and unequivocal disavowal that its reasoning permitted anything more than approval of inaction), with the opinion of the minority which insisted that action was necessary to prevent destruction of the legal right to collect rates upon which an invalid administrative order had had no effect.

We may perhaps clarify this in another way. The minority in the *Atlantic Coast Line* case undoubtedly held that until such time as an order of the Interstate Commerce Commission should be validly entered finding the intrastate rates of the Florida Railroad Commission to be discriminatory against interstate commerce, the Florida Railroad Commission's order could not be disturbed. The inevitable consequence was that the Atlantic Coast Line Railroad should make restitution. In that case there were both statutory and constitutional difficulties, the minority thought, in permitting an order of the Interstate Commerce Commission to displace an order of the Florida Railroad Commission until an order should be entered in accordance with the Federal statute and the rules laid down by this Court for judicial review. In our case there are precisely similar difficulties, in displacing the tariff rates filed by appellants. (See cases cited *ante*, p. 108.) No doubt Congress may displace such rates by legislative fiat as to what are just and reasonable rates. But the authority of Congress in such cases has nothing to do with the authority of the Secretary of Agriculture, who is merely its delegate authorized to fix just and reasonable rates in particular situations upon compliance with the condition precedent of a full hearing in accordance with judicial traditions. The statute ex-

pressly forbids such displacement until after it has been validly determined in *quasi*-legislative proceedings that appellees' filed rates are unreasonable and rates "thereafter to be observed" have been validly fixed. The Constitution (Amendment V) as construed by this Court likewise forbids interference with the rates and charges of market agencies until an order shall have been entered after according to the market agencies due process of law in the shape of a full, fair and open hearing.

The theory of the majority opinion in the *Atlantic Coast Line* case is, therefore, of no assistance to appellants if confined to its true *ratio decidendi*, to wit, approval of inaction. Inaction by the statutory court will not accomplish the Secretary's purpose of restoring the impounded funds to the shippers. It will merely result in the enrichment of the Clerk. Appellants therefore turn to the minority opinion and demand affirmative action on the part of the Court on the basis thereof. They then reject the holding of the minority opinion that a defective administrative order cannot supersede existing tariffs. This is indeed a strange and tortuous method of argument. The grotesqueness of the doctrines contended for, however, makes resort to extreme measures a necessity. This disposes of the fundamentally erroneous assumption of appellants when they say:

"But if the court of equity will stay its hand in order to protect the carrier against a technically persuasive claim for reparation, in obedience to the statutory prohibition of discrimination against interstate commerce, so too will it mold its decree to protect the former against dissipation of the impounded funds until the merits of this proceeding have been decided." (Brief, pp. 45-46)

The contention made in this case that the Secretary may affect past transactions by a *nunc pro tunc* order was also made by the carrier in the *Atlantic Coast Line* case, and on the same flimsy foundation, to wit, that although this Court had held the original order of the I. C. C. invalid for lack of proper findings, it had pointed out that the I. C. C. was "still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require" (282 U. S. at 215). The carrier argued that this must mean that when the I. C. C. made the proper findings, the order would be valid, since there would be no necessity for the Court to tell the I. C. C. that it could do what the statute clearly said it could, *viz.*, make a new order prospective in operation. This argument was amplified by the contention, repeated here, that since invalidity was due only to a procedural slip the defect could be corrected *nunc pro tunc*.

But the I. C. C., with a proper appreciation of its limited legislative authority and of its obligation to act in a judicial manner, apparently not shared by the Secretary, did not attempt to make its new order reach into the past. This Court did, however, comment on the railroad's argument. The majority was at pains to point out that when the I. C. C. sets aside discriminatory rates, "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past" (295 U. S. at 311) and that "the Commission was without power to give reparation for the injustice of the past" (p. 312) and still further that "we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect

of past transactions" (p. 317).²² The minority said, "the second and valid order made in 1932 cannot apply retroactively to affect lawful state rates in force prior to its issuance" (p. 327).

Lastly, it may be noted that not a single one of the various considerations which motivated the majority of the court in the *Atlantic Coast Line* case is present in this case. There was no contention in that case that a full hearing had not taken place. The I. C. C. had simply failed to make evidentiary findings to support its ultimate findings of discrimination. This is not a statutory requirement, as is a "full hearing". The only purpose of requiring evidentiary findings is to permit adequate judicial review. The I. C. C. may well have actually formulated evidentiary findings and merely failed to record them. That is a totally different situation from complete failure to accord a full hearing and the automatic acceptance of findings made by the active prosecutors for the Department without giving the market agencies any opportunity to attack them. In the *Atlantic Coast Line* case the I. C. C. had definitely reported that the Cummer Scale of rates obtaining during the restitution period was unreasonably low and confiscatory, in fact, about one-third of what it ought to have been. *Georgia Public Service Comm. v. Atlantic Coast Line*, 186 I. C. C. 157, 193. In our case there is, as we have shown, no indication whatsoever that appellees' filed rates were unreasonable, and every indication to the contrary. In the *Atlantic Coast Line* case, the I. C. C. had held that the charges col-

²²Indeed, a quasi-legislative order such as the Secretary proposes to make can never be *res judicata*. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226; *State Commission v. Wichita Gas Co.*, 290 U. S. 561, 569.

lected by the railroad were reasonable. In our case there has been no holding that we ought to have charged the Secretary's rates. In the *Atlantic Coast Line* case there was no contention that during the restitution period there had been any change in conditions, whereas in our case we have filed an affidavit to the effect that there was, as everyone knows, a very radical change in conditions justifying higher charges by appellees (see Point X, subdiv. 4, pp. 136 *et seq.*, *post*). Indeed, the price of beef cattle doubled during this period and the price of hogs tripled, as statistics on file with the Secretary of Agriculture show.

VIII

THE COURT HAD NO POWER TO CONDITION ITS TEMPORARY RESTRAINING ORDERS IN SUCH A WAY AS TO FIX REASONABLE RATES DURING THE IMPOUNDING PERIOD. NOT HAVING DONE SO, IT FOLLOWS A *FORTIORI* THAT IT CANNOT BE COMPELLED TO NOW FIX THEM RETROACTIVELY.

In Points I and II we have shown that the Court did not attempt to condition its temporary restraining order to provide for a distribution of the impounded funds in accordance with reasonable rates to be determined by the Secretary or by it at the conclusion of the litigation. It is elementary that it is discretionary with the Court whether or not to attach conditions to an injunctive order, except as the statutory law may require certain conditions to be attached (Title 28, U. S. Code, Sec. 382). This in reality is the end of the matter. Were it not, however, it is plain that had the Court desired to act otherwise it would have lacked power to condition its temporary restraining

order either upon a subsequent determination by the Secretary or upon a subsequent determination by the Court as to the reasonableness of the charges collected during the impounding period. This being so, it is clear that the Court cannot be compelled to do now that which at the time of the entry of the temporary restraining order it did not attempt to do and would have lacked power to do.

Newton v. Consolidated Gas Co., 258 U. S. 165, at page 177, is an express authority to the foregoing effect. In that case it was held by this Court that it was error for a District Court to impose the condition which appellants assert it ought to have imposed and must now impose, and at page 177 it was said:

"It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts and should not be attempted either directly or indirectly. After declaring the eighty-cent rate confiscatory, the court should not have attempted, in effect, to subject the Company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing."

While an amendatory decree conditioned upon the impounding of excess collections *pending appeal only* was upheld, *all impounded funds were ordered distributed* when the lower court's decree adjudging the rate confiscatory was upheld (pp. 173, 177-8).

In this case the Court is being asked to read a condition into the temporary restraining order issued by the statutory court which that court disavows. It is said (Govt. Brief, p. 56, footnote) but without any great emphasis that

if the Secretary cannot make a *nunc pro tunc* order the Court should come to his assistance. To do this would, however, require the statutory court to fix reasonable rates. But rate-making is essentially a legislative function. It does not require the application of rules of law to the facts but requires the application thereto of legislative discretion. It has consequently been held in numerous cases that the Court has no power to fix reasonable rates.

Reagan v. Farmers Loan & Trust Company,
154 U. S. 362, at pp. 396-397;

Norwood v. Baker, 172 U. S. 269, at pp. 294-295;

Prentiss v. Atlantic Coast Line, 211 U. S. 210, 226;

Robinson v. B. & O., 222 U. S. 506;

I. C. C. v. Humboldt S. S. Co., 224 U. S. 474, 483;

Louisville & Nashville R. R. v. Garrett, 231 U. S. 298, 305;

Ohio Valley v. Ben Avon Borough, 253 U. S. 287, 289;

Newton v. Consolidated Gas Co., 258 U. S. 165 and 265 U. S. 78;

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, at p. 291;

Terminal R. R. Ass'n v. U. S., 266 U. S. 17, 30;

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U. S. 264;

Morrell v. Brooklyn Borough Gas Co., 231 N. Y. 398;

Cf. Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 280;

Keller v. Potomac Electric Co., 261 U. S. 428.

Indeed, it was not even claimed by appellants in their application to the statutory court that it could, without prior recourse having been had to the Secretary, set reasonable rates for the impounding period. The sole proposal made by appellants to that court was that the Secretary should make an order in the reopened proceedings, as of June 14, 1933, and that this order would be conclusive upon the Court in distributing the impounded funds. That court was certainly justified in restricting its consideration to the express request made.

In *Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky*, 290 U. S. 264, the Gas Company had obtained and accepted a franchise to furnish gas to the City of Lexington at just and reasonable rates to be prescribed by the Railroad Commission of the state. The franchise further provided that pending determination by the Commission the Gas Company should charge a temporary rate of 50¢ per thousand, which might be increased to 60¢ per thousand upon the provision of increased services required by the franchise. The franchise further provided that out of the rates collected, whether 50¢ or 60¢, 10¢ "should be impounded under the direction of the Commission pending the determination of a reasonable rate by it". The requisite condition having been met, the temporary rate became 60¢.

The Commission thereafter fixed 45¢ per thousand as a just and reasonable rate and directed that the moneys impounded under its direction be distributed in accordance

with such finding. The Gas Company brought suit to set the order of the Commission aside as confiscatory. The District Court on final hearing found that the 45¢ rate was confiscatory but that a 50¢ rate would be just and reasonable. It consequently conditioned the granting of the permanent injunction, to which the Gas Company had become entitled, upon the Gas Company's consent that the fund impounded in excess of the 50¢ rate found by the court to be reasonable should be distributed to the patrons from whom collected.

So far as appears from the opinion, the court did not undertake to condition the permanent injunction upon the observance by the Gas Company for the future of the rate found by it to be reasonable. In any event the ground upon which the appeal was taken and upon which the case was decided in this Court was that the court had no right to condition permanent relief against an invalid order of the Commission upon the application to the services furnished during the pendency of the proceedings before the Commission and in court of the rate found by the court itself to have been reasonable during the impounding period. This Court reversed. After referring to the power of a court of equity "in the exercise of a sound discretion" to impose conditions upon the relief accorded, the Court said:

"There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both

because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton v. Consolidated Gas Co.*, *supra*; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 397; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282; *cf. Keller v. Potomac Electric Power Co.*, 261 U. S. 428; *O'Donoghue v. United States*, 289 U. S. 516."

This, be it observed, was said in a case in which the court undertook to condition its final decree upon observance in respect of past transactions of a rate determined by the court to be reasonable. In *Newton v. Consolidated Gas Company*, *supra*, the court had held that a final decree setting a rate order aside could not be conditioned upon the observance of a rate to be thereafter fixed by public authority. In the *Kentucky* case it held that such final decree could not be conditioned upon the disposition of funds impounded in respect of past transactions in accordance with a rate found by the court to have been reasonable therefor. Reading these two cases together, therefore, the court below was without power to require the impounded funds to be disposed of either according to some rate to be hereafter established by the Secretary or some rate to be found by the Court in the instant case to have been a reasonable rate during the impounding period.

In the *Kentucky* case, this Court, having reversed the decree below upon the grounds stated, directed that the impounded funds should be turned back to the custodian appointed by the Commission, by whose order they had been originally impounded, to await its action in fixing a lawful rate. This direction was not given, however, by

reason of any supposed equitable considerations or in the exercise of a power to "mold" the franchise provisions "to effectuate substantive justice" or in the exercise of an assumed power to evolve a "procedural mechanism" to carry out "the cardinal requirement" of the franchise that the rates charged should be just and reasonable. Manifestly the Court directed that the impounded funds should be turned back to the Commission's custodian because the provisions of the contract or franchise required it. They had been impounded originally at the direction of the Commission because the franchise required that they be so impounded and held until such time as the Commission should determine what would be a reasonable rate, then to be disbursed in accordance with such determination. The Commission, although it had attempted to make such determination, had not done so.

The franchise, of course, was a contract to which the Gas Company had agreed and by whose provisions it was bound. Under that contract the impounded funds were to be held pending a final determination by the Commission which had not yet been had. By the strict letter of the franchise, therefore, the Gas Company was not entitled to the possession of the funds by reason of the fact that the Commission's first order had been set aside.

In this case, as we have seen, power to determine the reasonableness of rates covering past transactions, expressly granted to the Commission in the *Kentucky* case by the franchise, has been expressly withheld from the Secretary by Congress. The grounds upon which the direction in the *Kentucky* case that the impounded funds should be held by the Commission's custodian, under whose direction they had been impounded in the first place pending the exercise

of a power expressly conferred upon the Commission but then not yet exercised, are wholly absent in this case.

The fact that that case involved the validity of a rate made by a state commission while this case involves the validity of an order made by the Secretary is of no consequence. This Court has held that the District Court may not under the Interstate Commerce Act (*Texas and Pac. Ry. v. Abilene Cotton Oil Co.*) or, as conceded by the Government (Brief, p. 25) under the Packers and Stock Yards Act (*Sullivan v. Union Stock Yards Company*, 26 Fed. (2d) 60, C. C. A. 8th), determine the reasonableness of charges collected on past transactions except in suits brought to enforce reparation awards theretofore made by the Commission or the Secretary. Manifestly it may not exercise such power where the Commission or the Secretary are themselves prohibited by statute in proceedings instituted on their own motion, to make such an award.

IX

THE COURT AND THE SECRETARY ACTING IN COOPERATION, CANNOT BY ATTEMPTED JOINT ACTION EXERCISE POWERS NOT POSSESSED BY EITHER.

The Government in its last point argues that "sound government requires that courts and administrative agencies cooperate to secure both procedural and substantive rights" (Brief, pp. 71-76). This argument is difficult to follow. While the word cooperation appears in the heading and once in the text, neither the source nor the character of the cooperation proposed is disclosed or described.

It is said that the case involves a consideration of the "broader issues of administrative law" (Govt. Brief, p. 71). But the Government's whole argument in this case would break down that separation of the judicial function and the administrative or legislative function for which the Constitution provides and which has hitherto been the foundation of administrative independence in the past—an administrative independence which the Government itself has been most zealous in guarding. Congress has not undertaken to confer upon the District Courts under either the Packers and Stock Yards Act or the Interstate Commerce Act a supervisory or appellate administrative jurisdiction such as has been conferred upon the highest courts of some states by their constitutions. It once conferred such power upon the Court of Appeals of the District of Columbia in connection with the administration of the Radio Act of 1927 (Sec. 16, 44 Stat. 1169), but quickly withdrew it (Act of July 1, 1930, 46 Stat. 844). What powers the courts would possess under the Packers and Stock Yards Act, Interstate Commerce Act, Federal Trade Commission Act, etc., and how they should be exercised in the present case had Congress seen fit to model them along the lines of either the Virginia Constitution (*Prentis v. Atlantic Coast Line*, 211 U. S. 210) or the old Federal Radio Act, it is therefore unnecessary to consider. It seems doubtful, to say the least, whether such power could be conferred upon the District Court, a constitutional court. At any rate it has not been.

Courts and administrative agencies of the Government are thus compelled by the action of Congress, if not by the Constitution, "to regard each other as things apart" (Govt. Brief, p. 75). *Keller v. Potomac Electric Power Co.*,

261 U. S. 428. Each must recognize the rights of the other in its own sphere, but neither may act within the sphere of the other, delegate to the other any part of its own power, confer upon the other any power not conferred upon it by Congress, or in cooperation with each other exercise powers not conferred upon either.

If the Secretary may now validate his previous order so as to give it a retroactive effect, he does not need the consent or cooperation of the Court. If the Court may condition its final decree upon the settlement of past transactions upon the basis of what it determines to be reasonable rates, it does not require the consent or cooperation of the Secretary. If neither acting alone may bring about the result desired, it should be obvious that they cannot do it by proceeding jointly in the joint exercise of powers carefully withheld from each.

It is said that the Secretary should be permitted to correct his own procedural errors (Govt. Brief, p. 74). Nothing which the Court can do can prevent him from so doing if he has the power to do so and if he does so in the manner prescribed by the statute, and subject to such limitations, if any, as it may impose. So to act requires neither the consent nor the cooperation of the Court. But the Court may not confer upon the Secretary power to correct his error, or to correct it in any manner other than as provided by the statute, or to free him from the limitations placed upon his power by Congress itself.

To be more specific: Unless the Secretary's power to make rates for the future in the proceeding still pending before him has become exhausted, he may, after correcting his errors, do so. If it has been exhausted in this proceeding he may exercise it in another. But in either event

his action will be legislative in character and may speak only as of the future. Whether Congress, proceeding under the Commerce Clause, or a state, in the exercise of its police power, could make a rate to be applicable to past as well as future transactions need not be determined or debated. Congress has forbidden the Secretary to make any rate except "after full hearing". Within this limitation the Secretary may correct his errors without the consent or cooperation of the Court. But what he is seeking is a removal of this limitation. What he wishes to do is to exercise the legislative power conferred upon him by making rates to be operative *before* instead of "after" full hearing. This the statute forbids. And what the statute forbids neither the Secretary nor the Court, acting alone or in cooperation, may provide.

Similarly, had the Act conferred upon the Secretary the power to award reparation in proceedings instituted by him on his own motion, he would not need the consent or cooperation of the Court. He could correct his error and by his own lawful order require ~~past~~ transactions to be settled on the basis of such rates as the Secretary might now find to have been reasonable for the period in question. But Congress has expressly forbidden the Secretary to make any order "for the payment of money" in proceedings instituted by his own motion. A power thus expressly withheld cannot be assumed by the Secretary or conferred upon him by the Court, acting either separately or in cooperation with each other. Since the Secretary's order is to be and must be purely legislative and not quasi-judicial in character, appellees will not be bound thereby in so far as the past is concerned. Such an order cannot be *res judicata*. *Prentiss*

v. *Atlantic Coast Line*, 211 U. S. 210, 226; *State Commission v. Wichita*, 290 U. S. 561, 569.

In this part of its brief (p. 72) the Government also expresses apprehension that unless its position is sustained, orderly administrative process will be impeded and impaired by the "far fetched demands of ingenious counsel" and the timidity of the administrative agencies in dealing with them. The fundamental requirements of administrative procedure are simple and easily understood. They were laid down in the Court's first opinion in this case. They are not a matter of form but of substance. They have been successfully followed and applied in the administration of similar statutes. Any person qualified to bring to an administrative body those expert qualities of which the law assumes him to be possessed, ought to be able to comprehend and apply them if he also has the most elementary conception of the fundamental requirements of a full and fair hearing, especially if he has a staff of lawyers to advise him. But if, by reason of uncertainty in any case, administrative process should be delayed, this is no more than the usual concomitant of cases involving controversial questions, and this Court can easily check any practice of making far-fetched demands. Those which have been sustained by this Court in this case can hardly be classified as such.

But what of the results on the other side? If administrative tribunals may commit error with impunity and then correct it backwards, a premium is put upon snap judgments and a disregard of the fundamental substantive rights of the citizen. It is idle to suggest that no injustice results because upon a new trial the administrative agency will

deal out even-handed justice with an open mind. Theoretically, this may be so. Practically it is not. It is just not in human nature to be so meek and so judicially minded. The fundamental requirements of a full and fair hearing must be met when they first are required to be met, and when the mind of the administrative officer or tribunal is open, if their essentials are to be preserved. Any argument to the contrary is the same argument, based upon "administrative expedition" and "administrative convenience", made twice before in this case and twice rejected—once unanimously, and once with a single dissent.

Neither the Court nor the Secretary, acting jointly with the other, may exercise power which neither acting alone could exercise. Nor may they, acting in co-operation, exercise the legislative power of adding to or supplementing the provisions of the Act itself, especially in a manner directly contrary to the limitations contained in such provisions.

X

THE CONSEQUENCES WHICH WOULD ENSUE FROM A MOLDING OF THE STATUTE IN THE MAN- NER REQUESTED BY APPELLANTS.

Serious consequences other than those just pointed out (pp. 127-128) would also ensue in that the market agencies would be deprived of essential rights guaranteed to them by the Constitution and the statutes while extra-statutory rights and privileges would be conferred upon the shippers. All of this, although to be done in the name of equity, would only succeed in producing a most inequitable result.

1. The Government's theory would deny to the market agencies an impartial trier of the facts.

Indeed, the Government's theory is not at all that the Secretary shall in the reopened proceeding before him consider the evidence and listen to argument with an open mind in order to reach such conclusions as may be justified by the record.²³ This is shown by the fact that we are told by appellants that our fundamental error is in failing to note that the reopened proceeding before the Secretary "is merely ancillary to the original rate proceeding and to the invalidation by this Court of the Secretary's order for procedural error" and in failing to understand that "its only purpose and its only effect is to determine whether, and to what extent, the appellees have been prejudiced by the procedural defect in the earlier proceeding" which it is said "can appropriately be determined only by the Secretary" (p. 16).

Appellants expressly admit that only under the theory advanced by them can it possibly be argued that a *nunc pro tunc* order is permissible. But the theory is obviously untenable. The Secretary's powers are limited by statute, and the statute gives him no power to determine whether or to what extent he has missed the mark in fixing rates without a "full hearing". If it were necessary or appropriate to determine such a question at all, it would clearly be a judicial question determinable by the courts. The "inexorable safeguard which the due process clause

²³Cf. the Secretary's public statement in advance of reconsideration that the impounded funds "rightly belong to the farmer" (Govt. Brief, p. 96).

assures" that "the trier of the facts shall be an impartial tribunal" would become a hollow mockery if an administrative tribunal should be allowed to determine after having denied a "full hearing" whether and to what extent its action had been prejudicial.²⁴ *St. Joseph Stock Yard Co. v. U. S.*, 298 U. S. 38, at page 73 (concurring opinion of Mr. Justice Brandeis); Report of Committee on Ministers' Powers (Great Britain, 1932), page 76, wherein it is said that for one to be a "judge in his own cause" violates "the first and most fundamental principle of natural justice"; *Fitchburg Steam Engine Co. v. Potter*, 211 Ill. 438.

But since this Court has determined that as a matter of law the Secretary's order was a nullity, neither the Secretary nor the Court has any power to pass upon the question of whether or not, or to what extent, that order prejudiced the market agencies. Such determination in any event would be wholly impossible since it is obvious that the determination of reasonable charges for personal services is largely, if not entirely, a matter of discretion and opinion. Such being the situation, it is plain that the argument of appellants to the effect that the Secretary and the courts in cooperation may determine whether or not his prior judgment was correct, and if incorrect to what extent, should be rejected.

²⁴Even in a case reheard after reversal by an equity judge, whose impartiality is not injured by being also a prosecutor, the findings of fact are reviewed by an impartial appellate court upon the weight of the evidence. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 441; Cyc. of Fed. Procedure, Vol. 6, Secs. 2965, 3027. In a jury case, of course, a new jury always passes on the facts.

2. The Government's theory would confer upon the Secretary power to deprive market agencies of their rights to judicial proceedings before impartial judges and juries in actions for reparation.

Under the reparations sections of the Packers and Stock Yards Act of 1921 (Secs. 308 and 309) the Secretary must be first appealed to. If the defendant does not comply with the Secretary's order for the payment of damages, the complainant may bring an ordinary suit at law in the regular courts. Section 309 (f) provides: "Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order of the Secretary shall be *prima facie* evidence of the facts therein stated * * *." Amendment VII to the Federal Constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *". This constitutional provision, of course, entitles the defendant to a jury trial in a reparation suit brought in a Federal court. *Meeker & Co. v. Lehigh Valley Railroad Co.*, 236 U. S. 412, at page 430; *Parsons v. Bedford*, 3 Pet. 433.

Article III of the Federal Constitution vests the judicial power of the United States in courts presided over by judges serving during good behavior. The determination of whether or not the market agencies must reimburse shippers on account of past transactions is essentially judicial in character. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226. But irrespective of whether the question is one which cannot be taken from the courts, Congress in enacting the Packers and Stock Yards Act of 1921 clearly thought it to be such. In the case of the earlier and anal-

ogous Interstate Commerce Act, the I. C. C. in the first volume of its reports refused to make reparation awards because it felt that there was a constitutional right to trial by jury in such cases. *Council v. Western & Atlantic R. R. Co.*, 1 I. C. C. 638. In 1889 Congress made provision in such cases for actions at law and trial by jury (25 Stat. 869). The Hepburn Act of 1906 enacted provisions for money awards and suits thereon similar to those which have been incorporated in the Packers and Stock Yards Act (34 Stat. 590).

The three fundamental protections accorded by Congress to the market agencies were first, that the Secretary should not act in reparation proceedings, wherein money awards were to be made, upon his own motion, but should occupy the passive role of a judge; second, that the Secretary's order should be only *prima facie* evidence in the subsequent judicial proceedings which would have to be conducted to realize upon his award; third, that in these subsequent judicial proceedings there should be trial by jury. The right not to have the Secretary act upon his own motion meant, of course, that the market agencies were to be free from harassment as to the past except upon the motion of dissatisfied shippers. *It is directly opposed to the basic argument of appellants that Congress intended that no transactions should be had between market agencies and shippers except at rates fixed by the Secretary of Agriculture.* This provision prohibiting the Secretary from acting upon his own motion apparently was primarily intended to preserve his impartiality as a trier of the facts, it being evidently realized that a judge who is also a prosecutor can hardly be impartial.

If the contentions of the Government in this case were to be upheld by this Court, the market agencies under the Secretary's supervision could in every case be effectively deprived of all of the statutory and constitutional rights we have mentioned by a very simple device.²⁵ All the Secretary or any other administrative tribunal need do is to assume jurisdiction and make a "snap order" reducing existing rates upon little or no evidence or without any judicial consideration of evidence taken before an examiner. In order to prevent such an order from going into effect the market agencies would have to resort to a statutory court under the Urgent Deficiencies Act and there give bond or deposit in court the difference between their existing rates and the Secretary's reduced rates. The Government's argument there would be as here that the "errors" thus committed by the Secretary were mere "procedural slips" and not jurisdictional, and that therefore no obstacle exists to their correction *nunc pro tunc*. He need therefore only accord the "full hearing" at his leisure and then reissue the same order. With the "snap order" thus validated, the impounded funds would then be distributed or the bond realized upon "according to the equities"—that is the "reasonable rates" fixed by the Secretary in his "snap order" now validated. We cannot believe that this Court will sanction a theory which will make possible any such procedure.

²⁵It is, of course, elementary that statutes should always be interpreted, if possible, so as to avoid serious constitutional questions. *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346; *Blodgett v. Holden*, 275 U. S. 142, 148; *Lucas v. Alexander*, 279 U. S. 573, 577; *Crowell v. Benson*, 285 U. S. 22, 62.

3. The molding of the statute requested by appellants would provide for the shippers an attachment to which they are not entitled and without their giving any security therefor.

The Secretary cannot conduct reparation proceedings upon his own motion but must await complaints from dissatisfied shippers. Such suits are in every sense private suits and the expense of their prosecution must be sustained by the shipper. In this respect they fundamentally differ from quasi-legislative proceedings in the public interest. *Federal Trade Commission v. Klesner*, 280 U. S. 18, 26.

In such reparation proceedings, no shipper could in any way obtain security against any market agency, whether solvent or insolvent, in advance of recovery of a judgment. Appellants nevertheless argue that the shippers in this situation are entitled to what amounts to an attachment of the impounded funds pending the making of a further order by the Secretary fixing rates *nunc pro tunc*.²⁶

²⁶Since in neither event can the statute be molded in order to "evolve" an additional "procedural mechanism" for the accomplishment of justice more perfect than Congress has provided, it is unnecessary to determine whether or not the statute of limitations has run upon claims for reparation. That question may only be determined in properly instituted reparation proceedings. It may, however, be said, contrary to appellants' contention, that no obstacle ever existed to the timely filing of reparation claims, although doubtless the Secretary would have seen fit not to act thereon unless and until the order of June 14, 1933, was invalidated. The mere filing thereof would certainly not be burdensome.

The statute of limitations is ninety days (Section 309(a)). A year has elapsed since this Court invalidated the Secretary's order and ten months have elapsed since the

Putting to one side the fact that unliquidated damage claims do not ordinarily entitle plaintiffs to attachments, the remarkable fact is to be noted that no security is offered

statutory court ordered the impounded funds released. It is, therefore, idle to suggest, as do appellants in a footnote to page 29 of their brief, that this Court should order the retention of the entire impounded fund for an indefinite time for disposition in accordance with orders to be made by the Secretary in reparation proceedings which may or may not be brought. This would involve a wider and still more untenable construction of the phrase "pending final disposition of this cause", for a leading argument of appellants is based upon the contention that the reopened proceeding before the Secretary is not a "*new* rate proceeding" (Italics the Government's), and the only request made to the statutory court was to retain the impounded funds pending the making of a *nunc pro tunc* order in this "old" proceeding.

Without undertaking to argue that question, it is plain to be seen that appellants' arguments with respect to the statute of limitations are based upon a fundamental misconception with relation to the impounded funds. When the rates fixed in the Secretary's invalid order were enjoined by the Court, the market agencies were fully authorized to and did collect their filed rates and could have collected no other under pain of civil and criminal penalties (Section 306). The deposits made by them in court, while equivalent to the difference between the collections which would have been made under the rates in the Secretary's invalid order and under their filed rates, were not necessarily any part of their collections. The deposits were made as security, for that is what the statute (28 U. S. C., Section 382) requires.

It would appear therefore, although it is unnecessary to decide the question upon this appeal, that the causes of action for reparation arose not later than the various times when payment was made to the market agencies of their filed charges. If this be not so, however, a much fewer number of suits on the part of the shippers would be required than if they had in accordance with the statute filed reparation claims every ninety days.

against the attachment being improvident as it well may be if the Secretary finds after full hearing that the tariff rates of appellees are just and reasonable. The consequence of appellants' argument thus is to extend the security given by appellees far beyond the purpose for which it was given, while at the same time refusing any security to appellees against an attachment of their funds for an indefinite period. The last named consequence results from the fact that the Secretary acts on his own motion for essentially private purposes, but acting in the name of the Government apparently need give no security. (Cf. Federal Rules of Civil Procedure, Rule 65 (c).) To the above mentioned considerations should be added the fact that the judge in the cause who is to determine the disposition thereof is the one who demands the attachment on behalf of litigants before him.

4. It would be grossly inequitable for the Court to distribute the impounded funds in accordance with an order of the Secretary made *nunc pro tunc* as of June 14, 1933.

The only suggestion made by the Secretary to the statutory court in demanding that it retain the impounded funds was that he would proceed in the reopened proceedings to make a new rate order as of June 14, 1933, which, he asserted, would conclusively govern the Court in the distribution of the funds impounded during the period July 22, 1933 to November 1, 1937 (R. 185).

The basis for this suggestion on the part of the Secretary is that equity would thus be done. It is clear, however, that the distribution of the impounded funds in ac-

cordance with any such proposal would be wholly inequitable and unjust. The \$586,000 in the impounded fund in court was all derived from transactions taking place between July 22, 1933 and November 1, 1937. The Secretary's invalid order made June 14, 1933 was based upon conditions obtaining in the test year 1931 and in some part of the year 1932 preceding the termination of the hearings in that year. Conditions in the test year 1931, a depression year, were, as is common knowledge, entirely different from conditions in the period between July 22, 1933 and November 1, 1937. In the months preceding June 14, 1933, Congress had passed legislation of the most monumental consequence in the economic field, including the National Industrial Recovery Act, the Agricultural Adjustment Act, and the gold and monetary legislation. The Roosevelt administration soon became dedicated to a policy of raising prices. In January, 1934, the dollar was devalued by 40%. In the subsequent years serious droughts took place in the agricultural districts. It is common knowledge, as the statistics of the Department of Agriculture show, that during these years the price of beef cattle nearly doubled, and the price of hogs nearly tripled.

To distribute the impounded funds in accordance with a rate now made by the Secretary on the basis of the old record based on the test year 1931 and part of 1932 would obviously be inequitable. In the making of such an order it is impossible for the Secretary to consider actual conditions during the impounding period, for it would be absurd for a legislative order dated June 14, 1933, to be based in part on conditions obtaining during the subsequent four years.

It is obvious, as the history of the times since June 14, 1933 clearly shows, that by June 14, 1933 forces had been set in motion which were very likely indeed to make rates reasonable on the basis of the depression years 1931 and 1932 much too low in the ensuing years. Certainly persons who had all of their transactions in the near boom years 1936 and 1937 could hardly insist that the market agencies were not fully entitled to charge rates considerably higher than those made on the basis of the depression years 1931 and 1932. Indeed, as the record shows, the Secretary officially admitted on November 1, 1937, that conditions had changed to such an extent as to justify new and higher rates, and ordered such rates into effect, the appellees consenting.

It thus appears that the Secretary's proposed course can under no circumstances do equity, and neither he nor anyone else before the release of the impounded funds by the statutory court urged any other course upon that court.

5. Acceptance of appellants' contentions would result in a dangerous extension of the Secretary's already great power to fix maximum wages.

A complete formula for the economic domination and dictatorial control of labor by government is established if the contentions now advanced by appellants be accepted. This statement is no sterile abstraction because concrete demonstration of its accuracy is presented by the factual background of this case. The service rendered by appellees is personal service. They are skilled workers, nothing more and nothing less. The compensation to be fixed represents the maximum, not the minimum, wage to be paid by their clients, the employers. The compensation paid is the eco-

nomic lifeblood of labor, whether it be measured in terms dependent upon the period of service or upon the units of service performed. The "piece-work" system, common to the sweatshops, and the "speed-up" are frequent in industry. Fix the compensation per unit of service at a figure which will provide a fair or living wage only when a standard of performance beyond the capacity of the efficient worker is attained and labor is denied a fair wage. Such a standard of performance, far above that shown to have been actually attained by any salesman of cattle on a market where the annual volume of cattle handled per agency was twice the average national volume per agency, was prescribed by the Secretary's invalid order if the annual compensation per salesman the order recognizes as fair was to be earned by the worker. As the statutory court said:

"In this case the Secretary employed hypothetical costs based not upon present but upon *assumed* conditions which he expects may exist at some future time."

And this Court has said (304 U. S. 1, 20):

"It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services and will be compelled to go out of business. * * * While we are not now dealing

with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding (*Tagg Bros. & Moorhead v. United States*, 280 U. S. 420; *Acker v. United States*, 298 U. S. 426) places in a strong light the necessity of maintaining the essentials of a full and fair hearing, * * *."

Judge Van Valkenburgh describes the power exercised by the Secretary as one "almost dictatorial" in character (R. 239). When authority so vested is further implemented by recognition of the power, in the event the full and fair hearing so required be denied, to make a retroactive order, such authority becomes wholly dictatorial.

When on June 14, 1933, the Secretary made his order, now declared invalid, the market agencies were confronted with the necessity of determining whether or not to remain in business. They knew that to do so under the rates fixed in the order issued by the Secretary would be ruinous. They felt that the rates which they were charging were entirely reasonable, since they were admittedly 10% less than those approved by a former Secretary (R. 133). They were advised by their counsel and as it proved, correctly, that the Secretary's order was invalid. Those who continued in business after challenging the Secretary's order knew that during the period of the challenge they could collect their filed rates and could, under the law as it then existed, expect that if successful upon the challenge they could retain them. Indeed, the Solicitor General in his original argument to this Court admitted that there was no precedent for the Government's position that the Secretary was empowered to make a *nunc pro tunc* order. If the molding of the statute requested by appellants should be acceded

to by this Court, then in similar circumstances in the future market agencies in continuing business will not only have to gamble upon the correctness under the law of their challenge to an administrative order but will have to speculate as to what rates the Secretary, in his practically uncontrolled discretion, himself will set for the period of the litigation when, as and if he elects to set rates himself as the result of a judicial consideration of evidence and argument, instead of leaving the matter to subordinates. This would certainly be government by men and not by laws.

To require the market agencies to gamble upon such a contingency as the price of challenging an invalid administrative order would be unfair and unjust in the extreme. It would deny them all practical benefit of judicial review of administrative orders no matter how arbitrarily made. The right of a full and fair hearing before an administrative tribunal is valueless and is no longer in fact an "inexorable requirement" of due process of law unless supported by a practical mode of enforcement involving no penalty in the event of success, such as a redetermination *nunc pro tunc* before an administrative authority rendered hostile by the very fact of successful challenge.

We have *upon the facts* an instance of the application of power and authority of government arbitrary in character, not to the protection of a reasonable return upon property or to the determination of minimum rates of pay for the worker under the police power but to the fixation of the maximum compensation for the worker permissible under law. If the contentions of the appellants be accepted, "the ever shifting boundary between freedom and authority" will have been moved to a point where authority has become all-comprehensive.

XI

EVERY AVAILABLE INDICATION IS THAT APPELLEES' RATES WERE REASONABLE AND NO MIS-CARRIAGE OF JUSTICE REQUIRES THE IMPROVISATION OF AN EXTRA-STATUTORY REMEDY.

Appellants claim that it was mandatory for the statutory court to refuse to release the impounded funds to appellees and for it to retain these funds for an indefinite period until a further order made by the Secretary should be sustained or set aside in the courts, and not merely discretionary with the Court to release or retain the funds. It is obvious, however, that much of the material contained in their brief can have no possible relation to the mandatory argument. The probable reasonableness or unreasonableness of appellants' rates, for example, could not possibly condition the application of a mandatory rule.

The attempt of appellants to make use of the discretionary theory by indirection makes a brief reply to their unfounded claims desirable. These claims are summed up in the expression used by them that "every available indication points to the validity of the Secretary's order" (Brief, p. 21) and hence, it is implied, to the unreasonableness of the charges collected by the appellees during the impounding period. In order to comprehend how unjustified these claims are, it is necessary to briefly consider the history of appellees' charges, the character of the order made by the Secretary of Agriculture on June 14, 1933, and the subsequent court proceedings instituted for the purpose of setting it aside.

1. The history of appellees' rates indicates the reasonableness of the charges collected.²⁷

Appellees buy and sell livestock as agents for others, their clients, at the Kansas City stockyards. Their principals are the producers and shippers of livestock. Appellees deal principally with the buyers for the packers. It is not ordinarily, if ever, practicable for the shippers to give appellees price instructions. They are therefore under a duty as fiduciaries to buy and sell at the prices which are in their opinion the most favorable obtainable for their principals. These prices vary widely between different grades of livestock and from time to time. For the shipper everything depends upon the efficiency and thoroughness with which the bargaining process is conducted. Appellees' compensation is, however, not in any way dependent upon the prices obtained, but is fixed at so much per head of livestock and was formerly fixed at so much per car of livestock. Some of the appellee market agencies are large concerns, handling a greater volume of livestock than the total received at many public stockyards. Others are medium-sized businesses, and still others are one-man concerns.

Prior to the enactment of the Packers and Stock Yards Act of 1921 the charges of appellee market agencies were unregulated. That Act gave the Secretary of Agriculture the quasi-legislative power, either upon complaint of others or upon his own motion, to enter upon rate investigations

²⁷It is not believed that the statements contained in this subdivision can or will be disputed. The subject-matter, with record references, is generally covered in our prior briefs in *Morgan v. U. S.*, No. 686, Oct. Term, 1935, and No. 581, Oct. Term, 1937.

and if he found existing charges unreasonable to regulate these rates for the future, but only "after full hearing". It also gave him the quasi-judicial power, but only upon specific complaint, to make reparation awards for a very brief period in the past, which should be *prima facie* evidence in subsequent court proceedings provided for in the Act.

During the World War period from 1913 to 1919, when appellees' charges were unregulated, they were increased by only 10% despite increases of approximately 200% in the cost of living, farm wages, general hourly wages, and livestock prices. This was expressly admitted in the Secretary's answer to appellees' petitions filed in the statutory court to set aside his order (R. 133).

Shortly after the Packers and Stock Yards Act of 1921 became effective the then Secretary of Agriculture Henry C. Wallace, who was the present Secretary's father, upon complaint, entered into an investigation pursuant to the Act to determine the reasonableness of appellees' rates which theretofore had been unregulated. This resulted in the entry of an order in July, 1923, reducing these rates by about 15% (R. 212-230).

At that time the volume of livestock production was very high and livestock prices very low. Livestock production and market receipts declined (to the disadvantage of the market agencies) and livestock prices went to much higher levels (to the advantage of the shippers) in the years 1924 to 1929, but the rates set in July, 1923, continued in effect until the spring of 1930, when the investigation with which we are here concerned was entered into upon the motion of the Secretary and not upon complaint. At that time they amounted to but $\frac{3}{100}$ of 1% of gross proceeds.

The Secretary's order of inquiry which instituted this investigation did not charge that the charges previously fixed and held reasonable by the former Secretary were then unreasonable. It merely ordered an investigation to inquire into the reasonableness of these charges (R. 21). That investigation was based upon the test year 1929, a year when the country as a whole was enjoying great prosperity. By the time the hearings had been completed and the Secretary was prepared to make an order the country was deep in the depression of 1931-1932. Livestock receipts continued to decline. In May, 1932, appellees, taking cognizance of this fact, and for other reasons that do not fully appear of record, made a reduction in these rates and filed tariffs with the Secretary to yield 10% less than the rates which Secretary Henry C. Wallace had ordered into effect in 1923. This is expressly admitted by Secretary Henry A. Wallace in his answer to the petition to set aside his order (R. 133). If it had not been for an error of some subordinates of the Secretary, who reported in 1932 that a reduction of but 4% had been attained (see R. in No. 581, Oct. Term, 1937, I, 916), it is probable that these proceedings would have terminated with the filing of appellees' charges which are now so unfairly termed unreasonable. The Secretary did not elect to suspend these newly filed charges for the period allowed by the Act pending the conclusion of the hearing.

Appellees then petitioned for a rehearing based upon changed conditions since the test year 1929, in accordance with the doctrine of the *Atchison, Topeka & Santa Fe* case (284 U. S. 248). A rehearing was ordered, after the Secretary had voluntarily set aside a rate-fixing order made

in May, 1932, and hearings were then conducted with the test year 1931 as a basis, a year of marked depression.

2. The proceedings resulting in the making of the invalid rate order by the Secretary and in the impounding indicate the reasonableness of appellees' rates and the unreasonableness of the Secretary's purported rates.

Three and a half months after entering office, to wit, on June 14, 1933, Secretary Henry A. Wallace signed and issued the order which has been the subject of this controversy. As the hearings terminated in the fall of 1932, the record contained no evidence concerning conditions after that year.

This order, signed by Secretary Henry A. Wallace, drastically cut appellees' rates. His subordinates, who actually made the order, refused to be controlled or even to be guided by the actual costs of doing business of even the most efficient market agencies at the stockyards, although they made no finding that any of the market agencies there were inefficient. They thrust aside the actual selling performance of even the most efficient firms and salesmen in favor of the highly improper opinion evidence of two or three witnesses of dubious qualifications as to what might have been accomplished per salesman in 1929 if each salesman had been continuously supplied with an unlimited amount of livestock to sell. The theoretical figure for selling performance given by one of these witnesses, manager of a cooperative agency financed by the Government, was approximately the same as the total actually achieved by all four salesmen he employed for this concern.

The net result was rates which would yield a net return for each of the 136 owners of the 61 firms then in business of 48¢ per day and deficits for the two largest concerns at the yards, John Clay & Co. and Swift & Henry Livestock Commission Company, each doing a gross business of over \$10,000,000 a year. Inability to have the use of the impounded funds, representing the difference between the Secretary's rates and filed rates, has largely contributed to driving out of business one-fourth of the market agencies operating at the time of the Secretary's order.

The stockmen, who are not shown to have complained of the former rates approved by Secretary Henry C. Wallace (which were ten per cent. higher), were evidently satisfied with the rates in the tariffs filed by appellees in May, 1932, and continued to patronize these agencies at the new and lower rates. Thus, the impounded fund itself evidences the desire to continue to patronize appellee market agencies because the Government-financed cooperative agency and another larger cooperative, with disastrous effect upon their own finances charged the Secretary's lowered rates during the period of the impounding, and all shippers were free to ship to them. It is manifest, therefore, that those from whom the filed rates were collected by appellees did not care to avail themselves of the lowered rates of competitive agencies.²⁸

²⁸It is not to be contended that the clients who employed appellees during the period June 14, 1933 to November 1, 1937 were under any degree of compulsion so to do. These clients could sell their livestock direct to the packing plants adjacent to the stockyards (and such sales are made in large volume) without the assistance of any sales agent and without the payment of any expense for stockyards services, or they could avail themselves of the services of the large co-

As it was plain that they could not live under the rate fixed in the Secretary's order of June 14, 1933 and continue to render efficient service, the market agencies promptly filed a petition in the statutory court to set aside this order. To prevent irreparable injury to them by reason of inability to collect from thousands of shippers in the event the Secretary's orders should eventually be set aside, appellees, as they are given the right to do by law, asked for and obtained temporary restraining orders conditioned upon their depositing with the statutory court sums equal to the difference between what they should collect under their filed charges and what they would have collected under the Secretary's charges (R. 130). This impounding continued to November 1, 1937, when the Secretary, recognizing changed conditions, agreed with the remaining market agencies (many having been forced to discontinue operation) upon rates substantially higher than those fixed in the order of June 14, 1933.

It readily appears from the foregoing that "every available indication" is to the effect that the appellees' charges

operative selling agencies upon the stockyards (at the lower charges prescribed by the Order) or they could have sold the livestock at any one of a very large number of smaller public markets, close to their farms and ranches (the agents upon these markets charged substantially higher rates than those of appellees). It inevitably follows that appreciation of the efficiency of appellees' selling services as compared with that of other agencies, both on and off the market, accounts for the payment to appellees by their clients of the charges, the amount of which determined the amount of the funds impounded as security. It must also be borne in mind that equality of bargaining can only be maintained between the livestock grower and the packer when the salesman of the grower and the buyer of the packer are men of comparatively equal ability to judge the values of the numerous grades of livestock handled.

during the impounding period were not unreasonable. The Government nevertheless argues to the contrary (Brief, pp. 20-23). In respect of the hearings held it is said (p. 21), "The proceedings before him explored the issue with great detail— * * *. The Secretary made elaborate findings." The first of these statements, which refers to findings made by the Secretary's subordinates, is a half-truth because the findings ignore and fail to mention evidence favorable to appellees. The Secretary, who is the only person authorized to judicially pass upon the case, himself testified that he merely "thumbed through" and "dipped into" the record. The second statement is untrue, for the Secretary made no findings at all, although he rubber-stamped those of our adversaries, the prosecutors for the Government. This disingenuous attempt to show that the findings signed by the Secretary purporting to fix reasonable rates for appellees are valid by "every available indication" despite the holding of this Court must therefore be totally rejected.

3. The statutory court found that the Secretary's rates were arbitrarily arrived at.

A like conclusion must be drawn with respect to the attempts in the brief (pp. 21-22) to make use of the statutory court's holdings. It is claimed (p. 20) that the majority of the District Court on the first hearing found that the Secretary's findings were sustained by the weight of the evidence. The statement of the majority of the statutory court in the first opinion which is quoted in the brief is far from satisfactory in that it commences by "presuming that the findings of the Secretary are correct" and concludes with an admission that only so much of the testimony had been ex-

amined "as reasonably can be made, in view of its immense volume." Whatever consideration, however, such a statement would otherwise be entitled to, the opinion of the majority of the Court a few months later upon rehearing washes away.

In this opinion (referred to in the motion of appellees) written by Judge Van Valkenburgh (R. 240), he said: "Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by the petitioner, as stated above". Among these contentions made by the petitioner were that "the Secretary's order eliminates essential competitive costs" and "With this elimination agencies cannot compete at a profit", and that "The Secretary employed an unreasonable arbitrary, and illegal method in finding total unit costs; through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for ratemaking purposes in disregard of actual experience, basing rates on hypothetical considerations and assumed conditions * * *" and that "This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restriction of the agencies enabled to operate profitably."

Judge Van Valkenburgh further says: "That the Secretary did not, as was done in the *Tagg* case, use typical experience as his guide for determining reasonable costs for rate-making purposes", but "hypothetical costs based not upon present but upon assumed conditions which he

expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees". He further said: "Furthermore, I think the drastic reduction of advertising and other costs essential to getting and maintaining business gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken and ultimately to destroy this market by diverting business to other more favored markets and agencies and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market but equally to the shippers of stock who would most conveniently patronize it". He then says that he finds himself in full agreement with Judge Wilkerson in the case of *Acker v. United States*, where Judge Wilkerson said: "I do not concur in the findings of this Court, which adopt *in toto* the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence".

Judge Reeves at the end of Judge Van Valkenburgh's opinion, said: "I fully concur in the foregoing Memorandum." This full concurrence is characterized by our opponents (p. 21) by saying that upon rehearing Judge Reeves "appears to have wavered somewhat as to the reasons for dismissing the bill". Appellants, who contend that justice and equity so attend their cause as to demand that this Court overrule plain statutory provisions, do not exhibit that frankness and fairness in the presentation of facts

that should inseparably attend the presentation of such an issue.

Next it is said (p. 22) that the majority of the Court on the second hearing after remand by this Court stated that they had reached the same conclusion "on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference." Since this statement was made on July 2, 1937, and this Court had decided the *Acker* case in March, 1936, the Court was fully advised by the Government's brief that it had no power to go into the weight of the evidence since no issue of confiscation was involved. All that this statement can therefore possibly mean is that the Court still held to the former opinions of the majority, and believed that there was evidence to support the Secretary's findings.

Thus, the statements (p. 22) that "The Secretary, and on two occasions the district court, have affirmatively declared the rates fixed in his order to be reasonable" and "if Section 305 is to be given any meaning, we do not see upon what basis—in the face of this consistent record of determinations that the funds collected from the farmers were in excess of a reasonable rate—the appellees can be given the impounded funds," and "the order of the court below, directing payment to the appellees, denies the substantive rights of the farmers not only without a determination that the rates charged by appellees were reasonable, but in direct disregard of three determinations to the contrary," must be wholly rejected. Of the statement that "No court or tribunal has held them to be unreasonable," it of course can be said that no court has the power to pass upon such a question, as nobody knows any better than our opponents.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed or in the alternative that the order of the statutory court should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,

JOHN B. GAGE,

THOMAS T. COOKE,

Counsel for Appellees.

APPENDIX

Packers and Stock Yards Act, 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64,
42 Stat. 159, et seq.)

Title III.—Stockyards

• SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.¹ It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

¹Amended by an act of Congress approved May 5, 1926.

comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less

than ten days notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a

stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. - It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or

unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

**The Urgent Deficiencies Act
(28 U. S. C.)**

47. *Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such

application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for.—An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, § 1, 38 Stat. 220.)

47a. (*Judicial Code, section 210.*) *Appeal to Supreme Court from final decree; time for taking; priority.*—A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require, the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such

form and of such amount as the Supreme Court or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, § 1, 38 Stat. 220.)

United States Code, Title 28, Section 382

Same; security on issuance of. Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. (Oct. 15, 1914, c. 323, § 18, 38 Stat. 738.)

(9951)

SUPREME COURT OF THE UNITED STATES.

No. 221.—OCTOBER TERM, 1938.

The United States of America and the
Secretary of Agriculture, Appel-
lants,
vs.
F. O. Morgan, doing business as F. O.
Morgan Sheep Commission Com-
pany, et al.

Appeal from the District
Court of the United
States for the Western
District of Missouri.

[May 15, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

On this appeal we are asked to determine the proper disposition to be made of a fund paid into the court below pending a suit instituted in that court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City stockyards. The fund is made up of the difference between the scheduled rates and those prescribed by the Secretary's order, which was ultimately set aside by this Court in *Morgan v. United States*, 304 U. S. 1, without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute.

On June 14, 1933, the Secretary of Agriculture promulgated an order under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. §§ 181-229, setting aside a schedule of maximum rates to be charged for stockyard services, filed by market agencies at the Kansas City stockyards, and prescribing a new and lower rate schedule for the future. In a suit brought in the district court for western Missouri by appellees, conducting market agencies at the Kansas City stockyards, to set aside the order as confiscatory and as having been rendered without procedural due process, the court on July 22, 1933, entered a temporary restraining order enjoining enforcement of the Secretary's order upon condition that appellees should:

"deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may re-

main in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

After two appeals we reversed the final decree of the district court, which had sustained the order of the Secretary. This Court held that he had not accorded to appellees the "full hearing" which § 310 of the Act requires, and, without considering the merits, it remanded the cause for further proceedings. *Morgan v. United States*, 298 U. S. 468; 304 U. S. 1. A petition for rehearing, in part on the ground that the mandate of this Court had made no provision for the distribution of the fund paid into the district court pursuant to its restraining order, was denied in a memorandum opinion stating that the questions raised were appropriately for the district court, to which the cause had been remanded for further proceedings. The opinion added:

"We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide." 304 U. S. 23, 26.

By this remand the Secretary was left free to take such further proceedings as the statute permits. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 238-239; *Southern Railway Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Florida v. United States*, 292 U. S. 1, 9.

The Secretary thereupon, by order of June 2, 1938, reopened the original proceedings which had resulted in the challenged order of June 14, 1933. He directed that the "Proceedings, Findings of Fact, Conclusion, and Order" of June 14, 1933, be served upon the appellee market agencies as his tentative findings and order, with an opportunity for appellees to file exceptions to them and to make oral argument upon the exceptions. This action was followed, June 11, 1938, by the present proceeding, begun by motion of appellants in the district court to stay further proceedings there and to direct the clerk of the court to retain the impounded funds until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by

him. This motion was denied, and from the order of the district court granting a counter-motion by appellees to distribute the fund among them, the case comes here on appeal.¹ § 316 of the Packers and Stockyards Act, 42 Stat. 168, 7 U. S. C. § 217; 38 Stat. 220, 28 U. S. C. §§ 47, 47(a); § 238(5) of the Judicial Code, 28 U. S. C. § 345(5). This Court has stayed and superseded the order of the district court pending appeal. October 10, 1938.

The district court held that the fund should presently be distributed to appellees, both because the Secretary is without authority under the Act to make any order prescribing rates and charges which will be effective as of June 14, 1933, the date of his original order, and because it construed the terms of its own restraining order as requiring distribution of the fund to appellees on the final determination by this Court that the Secretary's order of June 14, 1933, was invalid. Thus, as a result of the litigation, the district court has twice sustained the determination of the Secretary that the rates prescribed by him, on the basis of voluminous evidence, were reasonable; but because of this Court's decision that the Secretary had failed to observe the statutory requirement of a full hearing, we have never reviewed that determination. The question now arises whether upon a redetermination of that issue by the Secretary the district court will have, and should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them. This issue must be decided now, for unless the court will have such power there is no occasion to retain the fund pending further proceedings before the Secretary, and distribution of it must be made as the district court has directed.

Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons of the stockyards prescribed

¹ On the same date the district court entered a decree on the mandate of this Court setting aside the Secretary's order of June 14, 1933, and permanently enjoining its enforcement. In that decree the district court retained jurisdiction and decreed that "such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain".

stockyard services at just and reasonable rates, and upon the authority and duty of the district court to effectuate that purpose in making disposition of the fund. Section 304 of the Act requires every stockyard owner and market agency to furnish non-discriminatory and reasonable stockyard services, and § 305 declares that "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful". Section 307 makes a like requirement as to regulations and practices in respect to furnishing stockyard services. Section 306 makes it the duty of stockyard owners and market agencies to file with the Secretary a schedule of rates for stockyard services and to charge and collect such rates, unless they are set aside by appropriate action of the Secretary or changed by the filing of new rates as authorized by the section. Section 308(a) provides that any stockyard owner or market agency violating any of the previously mentioned sections shall be liable to the persons injured to the full extent of the damage sustained. Section 308(b) provides for enforcement of such liability either by complaint to the Secretary or by suit in any district court, and concludes with the declaration that "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 310 authorizes the Secretary "after full hearing" on complaint, or on his own initiative, to prescribe just and reasonable rates for the future.

Appellees insist that notwithstanding the command of § 305 that all rates shall be "just, reasonable, and non-discriminatory", its mandate is effective only so far as implemented by the other sections of the Act; that except in a reparation case the statute forbids the Secretary to make orders affecting completed transactions, and that acting on his own initiative, as he does here, he can fix rates for the future only. They point out that under § 309(a) and (e) and § 310, any person aggrieved may, on petition to the Secretary, seek damages for the exaction of an unreasonable rate in the past, the naming of a new rate for the future, or both, but that when the Secretary institutes such proceedings on his own motion he is precluded by § 309(c) from making any order for the payment of money. As the original proceeding here and the action of the Secretary in reopening it were taken on his own motion, the conclusion is drawn that there can be no legal warrant for restitution of the impounded moneys to the patrons of the market agencies.

even though the Secretary shall now determine, on evidence and by proper procedure, that the scheduled rates exceeded the reasonable rates prescribed by § 305.

Even though the premises be accepted as in all respects sound, the conclusion does not follow. There is here no question of the Secretary's making an order for the payment of money. The fund having been taken into custody of the court, in consequence of its order restraining the operation of the rate schedule prescribed by the Secretary, the questions for our decision are whether the district court, in the discharge of the duty which it has thus assumed as a court of equity, can rightly dispose of the fund without regard to the command of § 305 if the Secretary shall determine that the rates exacted by aid of the court, and paid into its registry, are excessive; and whether, in the exercise of its discretion, the court should retain the fund until such time as the Secretary, proceeding with due expedition, shall make his final determination and order.

In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice;² neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373; *Inland Steel Co. v. United States*; — U. S. —; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment

² See Y. B. 22 Ed. IV. Mich. pl. 21; *Heath v. Rydley*, (1614) Cro. Jac. 335;

¹ Holdsworth, *History of English Law*, 459-465.

into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles.

Assuming, as appellees contend, that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of money, he was still not without authority in the premises under the statute and the mandate of this Court. He was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make. See *Atlantic Coast Line R. Co. v. Florida*, 295 U. S. 301, 312. No prior decision of the Secretary stands in the way of his making the determination now. Cf. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370. The sole limitation upon his power, prescribed by § 309(c), is that upon an inquiry instituted by him he may not order the payment of money. In other respects his power to investigate and decide is unaffected.³ He may make inquiry "as to any matter or thing concerning which a complaint is authorized to be made" to him, "or concerning which any question may arise under any of the provisions" of the Act, "or relating to the enforcement of any" provision. He is given "the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money." § 309(c).

That the Secretary, acting under § 309(a), could now entertain a complaint by the patrons of appellees who have contributed to the fund in court charging that the rates exacted were in violation of § 305, seems to be conceded and is, we think, plain. Section 309(a) specifically provides: "If . . . there appears to be any rea-

³ § 309(c): "The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money."

sonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper". It seems equally plain that under § 309(c) the Secretary, in the exercise of his discretion, may conduct such an investigation on his own motion. Ordinarily, it is true, there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order. But, as we shall presently point out, when the alleged excessive rates are in *custodia legis*, the court has authority and is under an equitable duty to dispose of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund.

The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the fund upon the termination of the litigation. The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. *Inland Steel Co. v. United States, supra*.

It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. *Central Kentucky Gas Co. v. Railroad Commission*, 290 U. S. 264, 271; *Pennsylvania v. Williams*, 294 U. S. 176, 185; *Virginia Railway Co. v. Federation*, 300 U. S. 515, 552 *et seq.* Congress having by the

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Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates, and equally so to direct it to the restitution of rates which it has taken into its own custody, once they are shown to have been unlawful. If such a determination had already been made by the Secretary in the proceeding before him, after full hearing, and if it were found by the district court to be supported by evidence, the duty of the court to make restitution forthwith would seem evident, notwithstanding the absence of any order of the Secretary directing the payment. *Inland Steel Co. v. United States, supra*.⁴ The Secretary, as we have seen, is authorized to make the determination. Section 305 denounces unreasonable rates as unlawful. The statute, as declared by § 308(b), saves to the court authority to give any remedy which in the present circumstances it might otherwise afford.

This Court went much further in *Atlantic Coast Line R. Co. v. Florida, supra*, in denying, on equitable grounds, restitution to shippers of the excess of an intrastate rate, prescribed by order of the Interstate Commerce Commission to avoid discrimination against interstate commerce, over that prescribed by the state commission, where the order of the former was later set aside by this Court for want of proper findings by the Commission. Upon further proceedings before the Commission it made a second order, upon proper findings of discrimination, establishing the rate as before. The final result of the litigation was that the railroads were permitted to collect and retain the higher rates for a period

⁴ In *Inland Steel Co. v. United States*, — U. S. —, the Interstate Commerce Commission had ordered certain railroads to cease the payment to shippers, in conformity to a filed tariff, of switching charges which the Commission had found to be unlawful. On review of the action of the Commission the district court stayed the Commission's order and directed the railroads, pending final disposition of the cause, to place further payments due under the tariff in a special fund to be held subject to the order of the court. The Commission's order was ultimately sustained, but meanwhile the Commission, pending review in the courts, had postponed the effective date of its order, so that during the litigation there was no operative Commission order forbidding the unlawful payments. This Court rejected the contention of the shippers that the fund must be paid over to them because it was accumulated in the absence of a controlling order of the Commission. We held that it was the duty of the district court, resulting from its injunction and its control over the fund, to make equitable disposition of it, and we sustained the district court's order that the fund should be turned over to the railroads in conformity to the Commission's determination, confirmed on judicial review, that the switching allowances were unlawful.

during which there was no lawful order of the Commission superseding the state commission rates. There, as here, the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. *Ewell v. Daggs*, 108 U. S. 143, 148, 149; *Weeks v. Bridgman*, 159 U. S. 541, 547; *Toy Toy v. Hopkins*, 212 U. S. 542, 548. Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action. *Atlantic Coast Line R. Co. v. Florida*, *supra*, 312-313, 317; *New York Edison Co. v. Maltbie*, 244 App. Div. (N. Y.) 436; *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. (N. Y.) 74.

It is said that the distinction between this and the *Atlantic Coast Line* case is the distinction between judicial inaction and judicial action; that there the court, upon settled equitable principles, was free to refrain from compelling restitution if satisfied that no injustice had been done, see *Tiffany v. Boatman's Institution*, 18 Wall. 375, 385; *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643, 645; *Deweese v. Reinhard*, 165 U. S. 386, 390, but that here the court is called on by appellants to act by withholding from appellees rates which are still lawfully in force because the filed schedule has not been set aside by a valid order of the Secretary. While at the moment appellants are content with inaction, and it is appellees who are demanding action—the payment to them of rates whose lawfulness is challenged and not yet determined—the actual posture of the case is such that the court is under a self-imposed duty to act by virtue of having taken the fund into its possession, and in acting to dispose of the fund it must conform to controlling legal principles. Reasonableness of the rates was not

established by the filed schedules. Had the rates collected been paid to appellees instead of to the clerk of the court, the Secretary could have ordered reparation upon proper findings that they were unreasonable. And the question is whether the court must now, in the face of a proceeding by the Secretary to determine the reasonableness of the challenged rates, use its power to complete their collection at the risk of obstructing reparation, or whether it should itself remain inactive until their lawfulness is determined and then act accordingly.

It is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process". *Arkadelphia Co. v. St. Louis Railway Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. *Northwestern Fuel Co. v. Brock*, *supra*; *Ex parte Lincoln Gas & Electric Co.*, 257 U. S. 6; *Baltimore & Ohio Railway Co. v. United States*, 279 U. S. 781. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See *New York Edison Co. v. Maltbie*, *supra*; *Brooklyn Union Gas Co. v. Maltbie*, *supra*; cf. *United States v. Klein*, 303 U. S. 276.

A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co. v. Florida*, *supra*, 312-313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the

Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. *Mahler v. Eby*, 264 U. S. 32; *Top v. Waldman*, 266 U. S. 113. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.

Reversed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 221.—OCTOBER TERM, 1938.

The United States of America and the
Secretary of Agriculture, Appel-
lants,

vs.

F. O. Morgan, doing business as F. O.
Morgan Sheep Commission Com-
pany, et al.

Appeal from the District
Court of the United
States for the Western
District of Missouri.

[May 15, 1939.]

Mr. Justice BUTLER, dissenting.

In proceedings instituted on complaint of shippers in 1922, the Secretary, July 27, 1923, approved a 15 per cent reduction of market agencies' charges. In May, 1932, the agencies filed tariffs, which were not challenged by shippers or suspended by the Secretary, making additional reductions of about 10 per cent. These rates remained in force until November 1, 1937. Then there became effective a new schedule established by agreement between the agencies and the Secretary. There being no question as to reasonableness of charges made since that date, the appellees were not required to continue making deposits to secure their compliance with the Secretary's order of June 14, 1933 challenged in this suit, and so impounding ceased.

The money on deposit in the district court is made up of amounts taken from charges as low as, or lower than, those so put and kept in force and applied until November 1, 1937. In the proceedings pending before him, the Secretary may not order reparation (See § 309. Also *Arizona Grocery v. Atchison Ry.*, 284 U. S. 370, 389) and is without jurisdiction to do more than prescribe charges to be applied after the effective date of that order if one shall be made. The challenged order having been adjudged invalid because made in violation of the Act (*Morgan v. United States*, 304 U. S. 1), the appellees immediately became entitled to the money that, in pursu-

ance of the restraining order, was deposited in court by them to secure their compliance with the Secretary's order if found valid. The record contains nothing to support the idea that the pledge was for any other purpose, or to justify or excuse withholding it for another use. For the reasons stated in its opinion, 24 F. Supp. 214, the district court rightly held appellees entitled to have their money returned to them. Its decree should be affirmed.

Mr. Justice McREYNOLDS and Mr. Justice ROBERTS join in this opinion.

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